Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Docket Nos. 95-20, 98-10

REPLY COMMENTS OF AT&T CORP.

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EXECUTIVE SUMMARY

The initial comments filed in this proceeding show, beyond doubt, that both law and policy require the Commission to reject the Bells' unprecedented attempt to evade Title II regulation, including their core section 251 unbundling obligations, for all of the unspecified services that they can lump into the amorphous category of "broadband." Indeed, both Qwest and BellSouth acknowledge that, where a competitive LEC uses a facility – such as the high-frequency portion of the loop – to provide telecommunications services, that facility is a "network element" subject to the section 251 unbundling requirements and that a competitive LEC can use that leased facility to provide both telecommunications services and information services. Both the statutory language and Commission compel the conclusion that Verizon and SBC may not manipulate access to a critical network element by deciding not to use it to provide a telecommunications service.

It is equally clear that, although an integrated Internet access service is an information service, the standalone broadband transmission services that the Bells provide today to both affiliated and unaffiliated internet service providers – and to business customers nationwide – are telecommunications services. Accordingly, these standalone broadband transmission services, which are generally offered to the public and purchased by an array of customers under nondiscriminatory terms, are common carrier services subject generally to regulation under Title II and, specifically, to the *Computer Inquiries* bundling and nondiscrimination requirements. Qwest's half-hearted attempts to argue otherwise fail – for the Supreme Court, courts of appeals, and the Commission have all made clear that a generally offered telecommunications service is a common carrier service even if ultimately purchased by, or even targeted at, only a limited customer segment.

With no legal support for their position, the Bells are forced to acknowledge that insulating their "broadband" wireline offerings from Title II obligations would require the Commission to grant them both an exemption for "broadband" services from the *Computer Inquiries* regulations *and* permission to offer standalone broadband transport as a private carrier service, provided on Bell-imposed terms only to Bell-selected customers. But the Bells do not, and could not, remotely justify those outrageous proposals. As the ISP and state commission commenters confirm, access to the Bells' wireline facilities remains necessary in order for competitors to provide broadband service. As such, the *Computer Inquiries* rules remain just as applicable and necessary in the "broadband" world. Even if the *Computer Inquiries* rules could be breached, the Bells could not possibly justify exempting these services from Title II regulation. Title II, at its core, outlaws the very discrimination that the Bells seek: discrimination against a class of customers based solely on those customers' intended use of transport services. That is why the Bells are unable to identify a single precedent that supports their attempt to insulate whole categories of transmission services, generally demanded, and used by large classes of customers, from Title II regulation. And the Bells' claim that they lack market power over ISP customers that rarely have any alternatives is simply absurd (and even if accepted, could not justify exempting broadband services altogether from Title II obligations).

Bereft of legal arguments, the Bells urge the Commission to ignore the law to advance broadband "policy." But the Bells' policy arguments remain just as weak and illogical as they have been throughout the Bells' campaign to evade regulation of their broadband services. The Bells claim to seek "regulatory parity," when, in reality, they seek to have the Commission blindly treat them identically to cable providers – notwithstanding the fundamental legal, market, and technological differences between cable and wireline broadband services. The Bells

"broadband investment" arguments, which have never been supported and defy fundamental economic principles, have now been foreclosed by the Supreme Court's recent decision to uphold the Commission's network element pricing rules in the face of these very same "broadband investment" arguments. *Verizon Communications, Inc.* v. *FCC,* 122 S. Ct. 1646, 1678 (2002). Because the Bells retain the ability and incentive to discriminate against unaffiliated ISPs, Title II regulation of their services remains necessary.

Finally, the Bells now seek to use this proceeding to evade not only federal regulation of their broadband services, but also state regulation. But neither section 706 nor anything else in the Act justifies such a result, and the public interest demands that state commissions remain able to protect both ISPs and consumers from Bell market power abuse.

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Pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, the Commission's Notice of Proposed Rulemaking of February 15, 2002, in the above matters,[1] and the Commission's Public Notice of February 28, 2002 (DA 02-485), AT&T Corp. ("AT&T") submits these reply comments.

INTRODUCTION

It should now be clear that the Bell Operating Companies' ("Bells") central anticompetitive goal in this proceeding – the evasion of Title II regulation and, in particular, the fabrication of a "broadband" exemption to their core section 251 unbundling obligations – is unattainable. As Qwest now concedes, "[w]hether the *ILEC itself* uses a given type of facility for the provision of a 'telecommunications service,' or exclusively instead for the provision of an 'information service,' the facility nonetheless can be a 'network element' so long as *the CLEC*

[1] *Appropriate Framework For Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd. 3019 (2002) ("Notice").

seeks to 'use[]' it for the provision of a 'telecommunications service.'"[2] And, as BellSouth acknowledges (at 18), "[o]nce the CLEC has access to the loop [or other network element,] it could use it to provide telecommunications as well as information services." Both the plain statutory language and the Commission's own rulings compel those conclusions, and the classification of services in this proceeding therefore cannot limit competitive LECs' statutory rights to lease network elements without regard to broadband and narrowband labels and to use all of the capabilities of those facilities to provide the telecommunications and information services that their customers demand.

Only Verizon and SBC continue to pretend otherwise, simply asserting that it "follows" from the definition of the term "network element" as "a facility or equipment *used in the provision of a telecommunications service*" that "unless an incumbent local telephone company uses a given facility or feature to provide a telecommunications service, the company has no obligation to offer that facility or feature on an unbundled basis."[3] But that does not follow at all. As the Commission (and now Qwest and BellSouth) have recognized, a facility remains a network element so long as it is "customarily employed" in the provision of telecommunications services, and the competitive LEC's right to lease that facility turns on *its*, and not the incumbent's, intended use. Under Verizon's and SBC's contrary view, a facility's availability as a network element (or not) could change from minute to minute, depending upon what services the incumbent LEC happened to be providing over the facility at any given time. Congress could not have intended such an absurd result.

[2] Qwest at 11 (emphasis in original).

[3] Verizon at 33.

The proper classification of the Bells' existing wireline broadband services should also be clear. When a Bell provides a single, integrated Internet access service to end users, it is providing an information service, because the Bell is not offering customers of that service pure transmission, but rather the ability to "acquir[e], stor[e], transform[ ], process [ ], retriev[e], utiliz[e], and mak[e] available information."[4] In contrast, as the comments overwhelmingly confirm, the standalone broadband transmission services that the Bells provide today are telecommunications services. No commenter seriously disputes that this pure transmission, "without change in the form or content of the information as sent and received,"[5] is "telecommunications." And given that this "telecommunications" is today available on nondiscriminatory terms under longstanding Bell tariffs, these services are quintessential common carrier telecommunications services. Qwest suggests that selling to internet service providers ("ISPs") (which generally purchase these tariffed services) might not meet the telecommunications service definition of offering service "to the public, or to such classes of users as to be effectively available directly to the public."[6] But Qwest does not even attempt to reconcile that position with the decisions of the Supreme Court, the courts of appeals, and the Commission that have all consistently held that general offerings *are* telecommunications services even if they are targeted at, and purchased by, only a particular fraction of the public.

Unhappy with the real world in which their standalone broadband transport services are unquestionably telecommunications services, thus triggering Title II common carrier obligations, the Bells posit a hypothetical world in which they have no general offerings of standalone broadband transmission and instead deal with unaffiliated ISPs, if at all, only on a "private

[4] 47 U.S.C. § 153(20).

[5] *Id.* § 153(43).

carriage" basis. The Bells recognize that they have no ability under current law to bring that hypothetical world about and agree that it would require both of two radical Commission actions: (1) the creation of a sweeping (and entirely unprincipled) "broadband" exemption to the bedrock *Computer Inquiries* unbundling and nondiscrimination rules that require the Bells to offer standalone broadband transport on a common carrier basis and then (2) an unprecedented ruling that the Bells may from that point forward offer broadband transport as "private" carriers only to the customers and on the individualized terms the Bells select, notwithstanding the general demand for, and absence of alternatives to, those services. The Bells do not, and cannot, justify either proposal, and neither is defensible.

First, the Bells do not challenge the core rationale underlying the *Computer Inquiries* rules: that, so long as ISPs and other information service providers lack meaningful alternatives to the Bells' local transmission facilities, the Bells will have both the incentive and ability to discriminate against those information service providers. Instead, the Bells claim that they lack such market power over broadband information service providers. But that is clearly false. The Bells' market power conclusions rest almost entirely on assertions about the state of *retail* broadband Internet access competition. Even if this superficial discussion of national "shares" could provide any meaningful information about the Bells' localized market power over end users, any repeal of the *Computer Inquiries* rules must be based on a finding that the provision of *wholesale* services to ISPs is workably competitive. And, as the ISP and state commission commenters demonstrate, broadband ISPs do not have the same choices as end users – indeed, broadband ISPs rarely have *any* alternative to the Bells. The Bells speculate that cable and other broadband networks may some day provide ISPs with ubiquitous alternatives to the Bells'

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[6] *Id*. § 153(46).

broadband facilities, but the reality today (and for the foreseeable future) is that most ISPs in most areas will remain entirely dependent upon the Bells. Thus "the predicate underlying the *Computer Inquiries* unbundling requirement – the existence of bottleneck facilities,"[7] plainly *does* apply to the Bell's wireline broadband services, and there is accordingly no sustainable ground for the broadband exemption that the Bells seek.

Second, and in any event, the Bells' claim that a repeal of their *Computer Inquiries* obligations would open the door for a further Commission order authorizing them henceforth to sell broadband transmission on unique (and undisclosed) terms offered only to selected ISPs is also baseless. The Bells seek a complete exemption from Title II regulation for *any* use of broadband for *any* purpose, including, for example, the T1 and other Bell broadband transmission services upon which businesses nationwide depend. They stake out that facially absurd position presumably because there is no possible basis for a Commission decision allowing Verizon to single out a class of customers, ISPs, for different treatment than other customers that purchase the same functionality. Such a decision would, of course, be antithetical to the most basic principle of Title II regulation that the Bells may not discriminate against particular customers based upon the customers' intended use of transport services (*e.g.*, to provide retail services that compete with Bell services).[8] Any such "use restriction" would also be entirely unworkable, inviting regulatory arbitrage and producing endless disputes over whether particular customers were operating as "ISPs."

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[7] SBC at 24.

[8] *See*, *e.g.*, *Notice* ¶ 42 (noting that *Computer II*, under Title II, required that "common carriers owning transmission facilities and providing enhanced services must unbundle their basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations").

But there is also no possible basis for the Bells' much broader request for a complete "broadband" exemption from Title II regulation. The Bells' networks were built for and have always been operated to provide point-to-point transmission to any customer who requests it. Common carriage is therefore the wireline rule, and private carriage the rare exception that applies only to truly ancillary or specialized services. That is why the Bells cannot point to a *single* precedent for the extraordinary ruling they seek here – a private carriage "reclassification" of one of their *basic transmission services* that is generally demanded and used by large classes of customers, has no generally available substitutes, is used to compete with the Bells' own services, and has always been generally offered on a common carrier basis.

Verizon does supply the Commission with an impressive list of "private carriage" decisions, but those decisions only confirm the illegitimacy of the Bells' proposal. Without exception, the decisions that actually authorize private carriage (and many on the list contain no private carriage determinations at all) fit squarely within the recognized and quite narrow exceptions for (i) ancillary (*i.e.*, non-telecommunications) services and (ii) new and truly specialized services for which there is no general demand.

Lacking precedent, the Bells retreat once more to unsupportable claims that they lack relevant market power. That is false. The Bells' claims simply cannot be squared with the troublesome fact that broadband ISPs, like narrowband ISPs, lack real world alternatives to the Bells' facilities. But even if the Bells' market power premise were true, it would provide no basis for the sweeping exemption from Title II regulation that the Bells seek here. As the Commission's nondominance decisions make clear, a wireline carrier's showing of a lack of relevant market power can be a reason for *relaxing* Title II regulation, but not for *eliminating it*

altogether – even nondominant carriers remain common carriers subject, for example, to the core statutory prohibitions on unreasonable discrimination and unreasonable practices.

In short, if the regulatory classification and implication issues in this proceeding are to be decided on the law and the facts, the Bells' campaign to end Title II regulation of their broadband transmission services is doomed to failure. For that reason, the Bells' comments are much less about what the law is or even what, given existing statutory constraints, it could be, than about what the law *should* (in the Bells' view) be. The Bells may continue to lobby Congress with those policy arguments, but they have no place here and certainly provide no basis for ignoring the governing legal requirements.

In all events, each of the Bells' tired policy arguments rings hollow. Here, as in virtually every recent filing they have made, the Bells trot out the twin specters of "regulatory parity" and "broadband investment." And here, as in their previous filings, those arguments are all rhetoric and no substance. The Bells' misguided version of "regulatory parity," for example, requires, not an identical analytical framework, but identical *outcomes* without regard to the relevant circumstances, because the Bells have no answer at all to the legal, market, and technological differences that require different regulation of cable and wireline broadband services. And the Bells' "broadband investment" arguments are really just collateral attacks on the adequacy of the compensation provided by the Commission's TELRIC rules. Those arguments are both wrong as a matter of economics and foreclosed as a matter of law by the Supreme Court's recognition that "TELRIC rates leave plenty of room for differences in the appropriate depreciation rates and risk-adjusted capital costs depending on the nature and technology of the specific elements to be priced."[9]

[9] *Verizon Communications, Inc.* v. *FCC,* 122 S. Ct. 1646, 1678 (2002).

The Bells' final policy argument is yet another reprise of their retail market power refrain – *i.e.*, that retail competition with cable means that there is no *need* to apply the law as written – backed by two short "statements" signed by a total of nearly 50 economists. The names are impressive, but the statements are not. The Bell economists make two unremarkable observations: (1) that wholesale access regulation can be costly, and (2) that, in competitive markets, facilities owners have incentives to enter into wholesale arrangements with unaffiliated entities. It is, of course, true that where the relevant markets are workably competitive, regulatory intervention is rarely necessary. But the critical question here – with respect to which the Bells' economists provide no analysis at all – is whether there *is* sufficient competition to eliminate the Bells' incentives and abilities to discriminate against ISPs and competitive carriers. And, as explained below and in much greater detail in Professor Robert D. Willig's declaration (attached to AT&T's initial comments), the answer is clearly no.

Finally, the Bells claim that if the Commission does somehow buy into their topsy-turvy view that there should be no *federal* wireline broadband regulation, it must also preempt any *state* regulation. The Bells suggest that authority for this wholesale preemption can be found in the section 706 mandate to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[10] But preemption is fundamentally a question of congressional intent, and the plain language of section 706 – which declares that it is the job of not only the Commission but also of "*each State Commission with regulatory jurisdiction over telecommunications services*" to promote advanced services through "regulating methods," *id*. – makes clear that Congress did *not* intend the Commission to occupy the field (or, as the Bells would have it, to order all regulators to abandon the field). Moreover,

[10] *Codified* at 47 U.S.C. § 157, statutory note (a).

even if the Commission could carry out the sweeping preemption that the Bells seek, it would not be in the public interest to do so. The Commission has recognized that broadband markets are local, that competitive activity varies markedly from one locale to the next, and that in some areas neither ISPs nor consumers have *any* alternative to the Bells' broadband facilities. It would be the height of arbitrariness to ignore those realities, and thereby, to muzzle state regulators who determine that the competition made possible by unbundling and nondiscrimination rules is more likely to promote the timely deployment of advanced telecommunications capabilities.

In sum, this proceeding must end with a fizzle and not the bang that the Bells imagined. Under a straightforward application of the clear legal requirements to the indisputable facts, the Bells' standalone broadband transmission services are, and must remain, Title II-regulated telecommunications services, and both the *Computer Inquiries* unbundling and nondiscrimination rules and section 251 obligations must continue to apply to broadband and narrowband facilities and services alike. Any other result would be flatly unlawful, enormously harmful to competition and consumers, and predestined for reversal.

ARGUMENT

I. BROADBAND WIRELINE INTERNET ACCESS SERVICES ARE INFORMATION SERVICES AND STANDALONE BROADBAND TRANSMISSION SERVICES ARE TELECOMMUNICATIONS SERVICES.

Broadband Internet Access Services. A wireline broadband service that consists of a single, integrated Internet access service to end users is an information service, because the provider is not offering customers of that service pure transmission, but rather the ability to "acquir[e], stor[e], transform[ ], process[ ], retriev[e], utiliz[e], and mak[e] available information." 47 U.S.C. § 153(29). A facilities-based provider of such an integrated

information service may supply "telecommunications" to itself (as an input to the finished information service), but there is no provision of a "telecommunications *service*," because there is no *sale* of telecommunications to the public (or, indeed, anyone).

Standalone Broadband Transmission Services. There is no real debate that the Bells' existing tariffed standalone broadband services are telecommunications services. Those services are pure transmission services and thus, as the Bells concede, obviously are "telecommunications."[11] Because these services are made generally available on nondiscriminatory terms in publicly filed tariffs, it is likewise plain that they are "telecommunications services" – *i.e.,* "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public."[12]

Qwest suggests that its bulk sales of standalone broadband transmission services to ISPs (as inputs for the ISPs' information services) are not sales to the "public."[13] But this flies in the face of express holdings of the Supreme Court, D.C. Circuit, and the Commission,[14] recognizing that "[o]ne may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population" when the service has been generally and nondiscriminately offered to these customers.[15] As the Commission has explained, "although bulk DSL services sold to Internet Service Providers are not retail services subject to section 251(c)(4), these services are telecommunications services, and as such,

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[11] Verizon at 9.

[12] 47 U.S.C. § 153(46).

[13] *See* Qwest at 17.

[14] *Terminal Taxicab Co.* v. *Kutz*, 241 U.S. 252, 255 (1916); *National Assoc. of Regulatory Utility Comm'rs* v. *FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) ("*NARUC I*"); *Independent Data Communications Mfrs. Assoc.,* Mem. Op. & Order, 10 FCC Rcd. 13717, ¶¶ 50-54 (1995).

[15] *NARUC I*, 525 F.2d at 641.

incumbent LECs must continue to comply with their basic common carrier obligations with respect to such services."[16]

That is not, of course, the answer that the Bells want, and they therefore urge the Commission to authorize them fundamentally to change the nature of their broadband transport services. That would require both a "broadband" repeal of the *Computer Inquiries* unbundling and nondiscrimination rules and an unprecedented ruling that the Bells may replace tariffed and nondiscriminatory offerings for which there is general demand (and no substitutes) with unregulated "private" offerings. Neither is permissible.

II. THERE IS NO BASIS FOR CREATING A BROADBAND EXEMPTION FROM THE BELLS' CORE *COMPUTER INQUIRIES* UNBUNDLING AND NON-DISCRIMINATION OBLIGATIONS.

The Bells provide no legitimate economic, technological, or legal justification for creation of a broadband exemption from the existing *Computer Inquiries* unbundling and nondiscrimination requirements. They implicitly acknowledge that there are no relevant technological differences between "broadband" services and narrowband services provided over the same facilities. Their principal contention – that the existence of retail competition in the market for broadband services has deprived them of any market power over ISPs – is demonstrably false. And, in light of the Bells' persistent market power over both broadband and narrowband ISPs, only the continuing application of the *Computer Inquiries* requirements, and not their abrogation, will foster information services competition and thus increase investment and innovation in this area.

Market Power. As numerous commenters have made clear, incumbent LECs' local exchange facilities are necessary for the provision of competitive, broadband information

[16] *Deployment of Wireline Servs. Offering Adv. Telecomm. Capability*, Second Report & Order,

services, and accordingly, access to those facilities is essential to ISPs seeking to provide broadband services.[17] As the Commission recognized in *Computer II*, "[i]f an incumbent LEC could "den[y] access" to "basic transmission facilities" it could "create a bottleneck in the supply of enhanced services" that "could produce a tendency to monopoly by forcing competitors of the carrier's [ISP] affiliate to leave the market or by persuading potential entrants that the extraneous risks of participation are too great."[18] Contrary to the Bells' comments, there have been no changes that support a relaxation of the core *Computer Inquiries* unbundling and nondiscrimination requirements as applied to incumbent LECs' broadband transport facilities.[19]

The Bells' repeated assertions that there is competition for end-user customers of broadband service in some local areas is simply beside the point. The need for the *Computer Inquiries* rules does not turn on the existence or level of *retail* competition; rather, it turns on the

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14 FCC Rcd. 19237, ¶ 21 (1999) ("*AOL Bulk Services Order*").

[17] *See, e.g.*, California at 5-6 ("Currently, one of three California residents live in areas where DSL service is the sole means of gaining broadband transport to an ISP. The incumbent LECs are the dominant, and in many cases, the exclusive provider of broadband service in California"); *id.* at 34-35 ("Currently, in California, the incumbent LECs remain the dominant provider of broadband services to residential and small commercial customers. More specifically, Pacific Bell/SBC controls the vast majority of California's 735,677 ADSL lines, and is virtually the only provider of DSL service in its service territory . . . today forty-five percent of Californians who live in locales with broadband capability have DSL service as their only broadband option.").

[18] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384, ¶ 208 (1980) ("*Computer II*"), *recon.*, 84 FCC 2d 50 (1980) ("*Computer II Reconsideration Order*), *recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom*., *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

[19] *See* California at 33 ("[n]othing has significantly changed that justifies the removal of the Computer Inquiry nonstructural safeguards. The BOCs continue to maintain exclusive control over essential bottleneck transmission facilities required by competitors for their own information services using wireline broadband technology. As such, the BOCs continue to have the ability and incentive to engage in discriminatory, anticompetitive conduct that favors their own information services").

wholesale alternatives available to ISPs seeking to offer broadband information services that compete with the incumbent's services.

Here, even to the extent that "*end-user customers* may have access to a variety of different platforms for receiving broadband services," – which, as demonstrated below, is often not the case – "*information service providers* do not have ready access to such platforms for the provision of their services to their customers."[20] Contrary to the Bells' bare assertions,[21] for most customers, the ISPs have no alternative to the Bells' broadband facilities. ISPs cannot turn to the owners of satellite or wireless broadband facilities. Although these technologies initially appeared quite promising, satellite and fixed wireless data services have not yet lived up to expectations.[22] Even if that should change, satellite and wireless providers do not generally offer unbundled broadband transport services to independent ISPs, and there is no indication that they intend to so in the future.

To be sure, cable systems are, in some areas, a potentially viable alternative for independent ISPs. At great expense, AT&T and other cables operators have worked to overcome the technical and operational obstacles to providing multiple ISP access on cable systems that were not even designed to carry two-way traffic, much less to accommodate multiple ISPs.[23] Thus, cable operators are now beginning to negotiate and enter arrangements with independent ISPs that would allow cable subscribers to have a choice of ISP. That said, only a fraction of cable systems have been modified to permit multiple ISP access, only a handful of ISPs have negotiated such arrangements, and it is far too soon to tell how cable/ISP

[20] *See* Big Planet at 22.

[21] *See* Qwest at 26; SBC at 29.

[22] AT&T at 49-50; Willig Dec. ¶¶ 28-29.

[23] AT&T at 50.

arrangements will ultimately be structured – the terms and conditions of that access can be expected to change as the market participants gain more experience in this area. But even if, contrary to fact, cable were today a ubiquitous alternative supplier to ISPs, that would hardly support the Bells' proposal to dismantle the *Computer Inquiries* safeguards. If Congress had believed that intermodal competition from cable would alone be sufficient to protect ISPs and other consumers from Bell market power, it would presumably have repealed the *Computer Inquiries* safeguards and limited its 1996 Act reforms to the interconnection and related rights necessary to ensure that that the Bells would exchange traffic with cable competitors. But Congress did precisely the opposite, leaving the *Computer Inquiries* regime in place and creating multiple avenues for intramodal competition by placing new unbundling and resale obligations on the Bells.

Thus, despite the Bells' protestations, there simply is no effective alternative to use of the incumbent LECs' bottleneck facilities for those who wish to provide broadband internet service. This reality is confirmed by the comments. Independent ISPs uniformly testify that cable, satellite and fixed wireless are not viable platforms for them, and that they remain highly dependent upon the incumbent LECs for broadband transport.[24] Thus, absent regulation, "the

[24] *See* AISPA at 2 (noting that ISPs generally "are dependent upon interconnection with incumbent local exchange carriers" in any context where competition has not yet affected the ILECs); *id.* at 9 (explaining that, to provide broadband service to small and mid-sized business, ISPs generally must rely on DSL); Big Planet at 15 ("Non-facilities-based ISPs, like Big Planet, still rely on ILECs for the transmission capacity used to transmit their broadband access services to their customers and this transmission capacity remains a critical input for the provision of these services."); *id.* at 34 (ISPs "remain virtually exclusively reliant on ILECs for transmission capacity"); EarthLink at 18 ("incumbent LECs are the dominant provider of wholesale transport" to ISPs and there are few "alternative competitive sources upon which ISPs can rely for wholesale broadband transport."). *See also* AOL Time Warner at 2 ("Currently, AOL products and features are access overwhelmingly through the wireline infrastructure"); Ohio/Texas/Washington ISP Assocs. at 46-47 (ISPs are dependent upon "dominant" ILECs and cannot rely on "intermodal" competitors).

incumbent LECs would assuredly restrict availability of DSL to affiliated ISPs in order to increase their market share in the retail high-speed Internet access market and stem the possible threat of new applications to the incumbent LECs' core business revenues."[25]

Even if they could be credited, the incumbent LECs' self-serving statements that they could be trusted to enter into unspecified "commercial arrangements" with ISPs for wholesale access do not obviate the need for the Commission to regulate the terms and conditions of that access.[26] Incumbent LECs "have strong incentives to resist" arrangements that would assist their competitors.[27] And, because there are no generally available alternatives to the incumbent LECs' stand-alone broadband transmission services today, "negotiations" between ISPs and ILECs are unlikely to lead to commercially reasonable terms.[28] As the Commission correctly found in the *Local Competition Order* (¶ 15), where an incumbent LEC has market power, and thus "superior bargaining power," and a potential competitor "comes to the table with little or nothing the incumbent LEC needs or wants," the resulting "agreements," if any, "would be quite different from typical commercial negotiations." Put simply, "market solutions" would only free the incumbent LECs to leverage their bottleneck facilities by insisting on anticompetitive access terms or by denying carriage altogether.[29]

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[25] EarthLink at 20.

[26] SBC at 28-29; Verizon at 31.

[27] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report & Order, 11 FCC Rcd. 15499, ¶ 55 (1996), *aff'd in part & vacated in part, sub nom Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part & rev'd in part, sub nom AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

[28] California at 39 ("A standard of 'market-based' or 'commercially reasonable' rates not only is too vague and ill-defined, but it provides little, if any, assurance of promoting the goals of the 1996 Act of lower priced services and greater customer choice through viable competition.").

[29] *See* Willig Dec. ¶¶ 56-57. Similarly, commenters generally agree that other alternatives identified in the *Notice*, such as relieving an incumbent LEC of the *Computer Inquiries*

In fact, there is considerable evidence that the Bells have been abusing loopholes in existing regulation to deny rival ISPs meaningful access.[30] The comments in this proceeding provide additional examples of incumbent LEC abuses. For example, the rates that incumbent LECs have charged for wholesale access are "far above retail, for entire phone lines, even with DSLAM port rental charges thrown into the mix."[31] Overall, "because the *Computer Inquiry* rules have not been vigorously enforced in the broadband Internet access services market, ILECs have been able to favor their own ISPs, and consumers often lack the kind of choice of ISP available in the dial-up market."[32]

Indeed, the Bells have now, for the most part, withdrawn their federally-tariffed retail offers of broadband transmission (*i.e.*, DSL transmission unbundled from the Bells' ISP

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requirements once its local markets are open to narrowband competition, are unworkable. DirecTV at 65 ("Simply because a ILEC is meeting minimum performance standards in its provision of narrowband services does not mean that the ILEC is not engaging in systematic discrimination against ISPs in provision of broadband services. This is especially true if there are no safeguards in place to protect competing broadband providers against discrimination from ILECs that control facilities used to provide competing wireline broadband services."); California at 39 ("Allowing a BOC to close down its network to competitors as soon as the FCC certifies that the BOC has opened its market to competition would thwart the purpose of section 271" – competition in the market for broadband internet services).

[30] *See* AT&T at 59 (listing allegations of non-price discrimination by Bells against ISPs); Chandler Dec. ¶ 43 (demonstrating that Bell wholesale charges are well in excess of cost and prevent competition from unaffiliated ISPs).

[31] AISPA at 5.

[32] WorldCom *et al.* at 26. *See also id.* at 37-38 (noting that pricing of Bell DSL and the high market share for Bell affiliated broadband ISPs prove that the Bells have market power, and lack competition, in the wholesale broadband market); *see also* AOL Time Warner at 25-26 ("All evidence indicates there is a continuing and strong need to ensure that wireline carriers do not act in an anticompetitive and/or discriminatory manner as the deployment of broadband continues").

services). If the Bells were truly serious about maximizing consumer choice, they would be aggressively marketing such offers.[33]

Qwest and BellSouth break ranks with Verizon and SBC and seek to advance a "middle ground" position. They say that "wholesale" *Computer Requirements* rules are not necessary so long as the Commission continues to enforce the section 251(c)(3) unbundling obligations with respect to broadband facilities, allowing independent data LECs to purchase the incumbent LECs' loops and use them to provide DSL services.[34] Thus, according to these Bells, even where there are no alternative facilities-based providers available, ISPs will still have the choice of several DSL carriers to provide broadband access.

Whatever the theoretical merit of this assertion, it has no real application in the current market. An ISP does not generally have the option of choosing an independent data LEC to obtain commercially reasonable broadband transport should it be denied such arrangements by the incumbent LEC. The data LEC industry has imploded, with two of three major data LECs ceasing operation and with the third, Covad, having been through bankruptcy proceedings.[35] While AT&T believes that the Commission can reinstate its line sharing rules in response to the DC Circuit's recent decision in *USTA v. FCC,* it would be the death knell for remaining data CLECs if the Commission were to fail to do so.[36] Further, as AT&T explained in its comments

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[33] Willig Dec. ¶ 105.

[34] BellSouth at 18; Qwest at 26-27.

[35] Covad has survived bankruptcy, but now remains beholden to SBC. *See* Jim Wagner, *SBC Gains From Covad's Cash Problems*, www.internetnews.com (Nov. 13, 2001) (noting that "the deal has long-term ramifications that benefits six percent equity owner SBC, the largest provider of DSL services in the nation. It's a pact Covad could look back at with a rueful shake of the head over opportunities lost" and that the deal "gives SBC room to migrate all its DSL business to its newly-acquired DSL Internet service provider (ISP) arm, Prodigy").

[36] Willig Dec. ¶ 37.

in the Triennial UNE Review Proceeding, there are many states in the country where existing UNE rates and OSS systems have precluded competitive LECs from offering competing DSL services through line splitting arrangements, and even when UNE rates and OSS are otherwise favorable, the existing limitations on access to NGDLC and other loops have precluded competitive LECs from providing competing DSL service to a large and growing percentage of customers. Although the Commission should revise its rules to allow competitive LECs to access unbundled NGDLC loops in central offices, it will take time for competitive LECs to introduce DSL service in response to that decision, and it will allow this competition only in the relatively few states where both UNE rates and OSS systems permit it. And even then, CLECs must face the competitive reality that the prior impediments have enabled incumbent LECs to control over 90% of the customers in the DSL market,[37] most of whom are tied up by term contracts that also require the customer to use the incumbent's voice service on the line. Until this basic economic reality changes and ISPs *in fact* have ubiquitous and viable alternatives to the use of ILEC facilities, there can be no rational limitation of the core *Computer Inquiries* obligations.

Technology. The Bells' comments implicitly concede, as AT&T showed, that for purposes of the *Computer Inquiries* requirements, there is no material difference between broadband and narrowband technology.[38] Both services involve transmission, from one computer device to another, over copper wires that terminate at the customer's premises without

[37] Notably, the few remaining data LECs predominantly offer service to businesses. *Deployment of Adv. Telecomm. Capability to All Americans In a Reasonable & Timely Fashion*, Third Report, 17 FCC Rcd. 2844 ¶ 51 (2002) ("*Third Section 706 Report*"); *see also* Covad at 35. The *Third Section 706 Report* also notes that ILECs are adding customers at a much faster rate than CLECs. *Id.*

[38] *See* AT&T at 52-53; Chandler Dec. ¶¶ 23-31.

any net change in protocol and without any change in protocol during transmission. Thus, "[d]ial-up Internet access and DSL-based Internet access utilize the same bottleneck local network facilities and infrastructure."[39]

The Bells speculate that packet-based technology could, at some unspecified time, be different from the technology addressed in the *Computer Inquiries*.[40] That speculation, however, does not change the nature of the technology providing broadband internet services today (and for the foreseeable future); and today, ISPs are employing technology for broadband services that subjects them to incumbent LECs' market power and requires the continued application of the *Computer Inquiries* rules.[41]

The critical point is that "[c]hanges in technology may have improved transmission speeds and allowed the transfer and use of more sophisticated data and broadband services – and this evolution will continue. Even so, wireline broadband providers still rely on basic transmission services interconnected with the telecommunications network to provide these broadband services." [42] Market power flows from the control of transmission wires that are

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[39] WorldCom *et al.* at 47.

[40] *See, e.g.*, SBC at 6.

[41] Indeed, DirecTV suggests that "the ongoing evolution in broadband technology and services delivered over the publicly funded telecommunications infrastructure makes the *Computer III* safeguards even more relevant today than ever before." DirecTV at 50-51. *See also* EarthLink at 4 ("In order to promote broadband competition, the Commission should continue to apply *Computer II* principles of non-discriminatory access to transmission services, regardless of the 'next generation' networks under consideration").

[42] CBeyond, *et al*, at 56. *See also, e.g.*, California at 38 ("the critical question is not whether the technical characteristics of the network dictate a different regulatory regime (indeed, the 1996 Act precludes distinguishing telecommunications services based on technology), but whether the BOCs continue to maintain bottleneck control over network facilities that are essential to the provision of broadband services by competitors. If so, then the safeguards requiring the unbundling and interconnection must be maintained for the very same reasons that they were initially imposed").

critical inputs to unaffiliated ISPs' information services. It does not turn upon the types or sophistication of the electronics that the Bells happen to employ on those wires at any point in time.[43] In fact, in defining basic and enhanced services and creating the *Computer Inquiries* safeguards, the Commission "recognized and took into consideration future technological advances for both basic and enhanced services."[44]

Statutory Goals. The Bells argue that the purposes of the 1996 Act will be furthered, and competition, innovation, and investment encouraged, if incumbent LECs are released from the *Computer Inquiries* requirements. That premise is clearly false. In fact, "[b]oth the *Computer Inquiry* rules and the 1996 Act are built on the same premise: *deregulation* of telecommunications markets, and of markets that depend upon telecommunications inputs, is possible only with *regulation* of bottleneck telecommunications facilities."[45]

Because incumbent LECs continue to have market power over facilities essential to broadband internet access, the application of the *Computer Inquiries* requirements is necessary to ensure that independent ISPs are able to compete with incumbent LECs on the merits. And where, as here, one entity has control of a bottleneck facility, unbundling and nondiscrimination

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[43] AT&T at 9. *See also* Time Warner Telecom at 19 ("The Commission suggests in the NPRM that differences between broadband and narrowband information services make the common carrier classification of underlying transmission less necessary. When it comes to end-user connections, there is simply no basis for such a conclusion. The high-capacity loops needed to provide broadband can just as easily be used in anticompetitive discrimination as narrowband loops.").

[44] Allegiance at 5-6 ("The Commission in *Computer III* stated that it intended to, and did, fashion a framework that could accommodate changes in the network. Similarly, Congress in adopting the 1996 Act made clear that the Title II protections were meant to encompass evolving networks. Thus, these key safeguards are not technology-specific.").

[45] WorldCom *et al.* at 44. *See also* AT&T at 54-55 (discussing 47 U.S.C. §§ 230(b)(2), 257(a)-(b)); DirecTV at 59 ("the Commission's pro-competitive policies governing enhanced services in the *Computer Inquiry* proceedings are consistent with the pro-competitive policies set forth in the 1996 Act").

requirements are *prerequisites* to investment and innovation by all others.[46] On the other hand, as explained in greater detail below, the Bells' ability to charge cost-based rates for access to their network facilities ensures that they are adequately compensated for any risks that they assume in deploying broadband networks. Thus, section 706 and its purposes would be directly undermined by a broadband exemption from the *Computer Inquiries* obligations. California is correct: "Until the essential bottleneck controlled by the incumbent local exchange carrier is broken by continuing to enforce federal unbundling and interconnection requirements, the means to achieve 1996 Act's goals – through robust and viable competition – cannot be effectuated."[47]

III. THE BELLS MAY NOT ABANDON THEIR EXISTING TARIFFED BROADBAND TRANSPORT SERVICES AND BEGIN SERVING ISPS ONLY ON A PRIVATE CARRIAGE BASIS.

An illegitimate repeal of the *Computer Inquiries* rules is a necessary but not sufficient prerequisite to the regulatory transformation the Bells seek. Even if the Bells were no longer compelled by the *Computer Inquiries* rules to provide standalone broadband transmission on a nondiscriminatory basis, they do so today and could not simply abandon those offerings and commence operating as private carriers. Rather, as the Bells concede, they would still need the Commission to "reclassify" them as "private carriers" in the provision of broadband transmission services. That would be both unprecedented and patently unlawful.[48]

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[46] AT&T at 48-51; Willig Dec. ¶¶ 48-55.

[47] California at 2.

[48] *See* EarthLink at 13-14 ("Nothing about the nature of wholesale DSL service has changed to warrant a Commission reversal of its previous holdings that DSL sold to ISPs in bulk is a 'telecommunications service.' The essential character of the service, including the fact that it has been offered indiscriminately to all users, have remained the same since the 1998 *GTE DSL Order*. Any regulatory reclassification from common carrier to private carrier status, therefore, would conflict with the statutory meaning of 'telecommunications service,' as confirmed by the Commission's precedent and the *NARUC I* common carrier test.").

As an initial matter, it is important to have a clear understanding that the Bells do not seek a ruling that they can deal with ISPs on a private carrier basis, but a ruling that they can do so with respect to *all* customers interested in purchasing broadband transmission for *any* purpose. This means, for example, that a business that needs T1 or other broadband transmission could obtain such service, if at all, only on discriminatory terms dictated by the Bells. The Bells are forced to make that extraordinary blanket request because there is no possible basis for a ruling that the protections available to all other broadband customer classes could be denied to one class of customers – ISPs – based solely on the intended use of the service by that class of customers. That bedrock implementation of the Communication Act's core nondiscrimination requirements was settled long ago in response to the Bell Systems' efforts to treat competitor customers differently than other customers purchasing the same services or functionalities.[49] And even if it were lawful, the sort of "use restriction" that would be required for an "ISP only" or "information service provider only" private carriage ruling would be entirely unworkable, embroiling the Commission in endless disputes over whether particular customers' uses of broadband transmission relegated them to the disfavored class.

The problem for the Bells, however, is that seeking a *complete* exemption from Title II regulation for any use of broadband for any purpose is no less unlawful and unworkable.

A. Contrary To The Bells' Claims, There Is No Authority For Reclassifying The Bells' Broadband Telecommunications Services As Private Carriage.

The Bells' networks were built for and have always been operated as common carrier transmission facilities that provide basic transmission services on nondiscriminatory terms to any and all customers. Whole industries have been built around the long-held expectation that those basic transmission services will continue to be available on nondiscriminatory terms. Indeed,

[49] *See*, *e.g.*, AT&T at 42-46 (describing the core *Computer Inquiries* requirements).

consumers' expectations that the Bells' ratepayer-financed networks could not simply be withdrawn from public use is the very basis of Title II. Reclassification of a basic transmission service as private carriage would carry with it the unlimited power to withdraw the service or to discriminate in its provision. And for standalone broadband transmission services, that has implications well beyond the potential destruction of ISPs. Although the Bells have made no effort to define precisely what they mean by broadband, it is clear that the range of services over which they would assert absolute power would, at a minimum, extend to T1 and other "data" lines that countless businesses, carriers, and consumers depend upon today.

That is why the Bells cannot point to a *single* precedent for the extraordinary ruling they seek here – a private carriage "reclassification" of a *basic transmission service* that (i) is generally demanded and used by large classes of customers, (ii) has no generally available substitutes, (iii) is used to compete with the Bell's own services, and (iv) has always been generally offered on a common carrier basis. Indeed, there are only two circumstances in which Commission has authorized incumbent LECs to offer services on a private carriage basis: (1) when the Commission determined that the service, despite being tariffed in the past, did not, in fact, comprise or provide telecommunications, and (2) when the Commission determined that a new service should be offered on an individual case basis because it is unique to individual customers and because there is no (or little) general demand for the service. Standalone broadband transmission is obviously neither. First, the Bells concede that it is telecommunications.[50] Second, there plainly is general demand for the service from thousands of

[50] *See* Qwest at 8; SBC at 17; Verizon at 9.

ISPs that buy it today (as well as many more non-ISP customers) and, in most cases, ISPs (and business customers) have *no* alternative source of supply.[51]

None of the many Commission and court decisions that the Bells cite suggests otherwise. Many of the cases cited by Verizon, for example,[52] do not make *any* private carriage findings. In some of these cases, the Commission expressly stated that it made no determination regarding the common/private carriage status of any particular carriers.[53] In others, the Commission addressed only *statutory* private carriage under statutory provisions that have no relevance here.[54] Still others contain only the terms "private carriage" or "common carriage," but have absolutely no discussion of those terms or how they are to be applied.[55] And Verizon simply

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[51] *See, e.g.,* AISPA at 4-5.

[52] *See* Verizon Appendix, Ex. C.

[53] *Amendment of the Commission's Rules to Establish New Personal Communications Services*, Policy Statement & Order, 6 FCC Rcd. 6601, ¶ 7 (1991) (expressly making no finding of common or private carriage, and stating only that, at the time of the proceeding, the Commission "lack[ed] sufficient information . . . to determine whether common carriage private carriage, or some combination of both concepts will be optimal for [the brand new service in question]").

[54] *See, e.g., Mobile Radio New England Request for Rule Waiver*, Mem. Op. & Order, 8 FCC Rcd. 349, ¶ 3 (1992) (assessing whether a mobile service satisfies *statutory* conditions for private carriage SMR service which allows private carriage for carriers that do not interconnect with telephone service for a profit); *Amendment of Part 90, Subparts M and S, of the Commission's Rules*, Report & Order, 3 FCC Rcd. 1838, ¶ 24 (1988) (finding that legal status of SMR is unaffected by private carriage/common carriage distinction statutory provisions); *Communications Assistance for Law Enforcement Act*, Second Report & Order, 15 FCC Rcd. 7105, ¶ 8 (1999) (in the context of CALEA, the term "telecommunications carrier" differs from that in the 1996 Act).

[55] *See, e.g., An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, Mem. Op. & Order, 89 FCC 2d 58, ¶ 16 (1982) (noting, without exposition, that there may exist private carriage dispatch service); *Truth-in-Billing and Billing Format*, First Report & Order & FNRPM, 14 FCC Rcd. 7492, ¶ 94 (1999) (finding that private/common carrier paging services would not be adversely affected by a proposed rule change relating to carriers that would qualify as "small entities" under the small business association definition of that term); *Toll Free Service Access Codes*, Fourth Report & Order, 13 FCC Rcd. 9058, ¶ 21 (1998) (same); *Petition for Reconsideration of Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorization*,

mischaracterizes some of the cases that do address private carriage. In *Southwestern Bell Telephone Co.*,[56] for example, the court held only that the sole ground on which the Commission had asserted common carrier jurisdiction – the fact that the rates and terms of the dark fiber services had been filed in accord with the Commission's regulations – could not itself establish that the service was provided as common carriage and not private carriage, and expressly left open the possibility that there were other bases for Title II regulation.[57]

To the extent that the other decisions cited by Verizon are relevant, they fit squarely into one of the two limited circumstances noted above. As to the first, Verizon concedes that several

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Mem. Op. & Order, 98 FCC 2d 792, ¶ 16 (noting only that the rules governing FM radio station subcarriers are aimed at, among other things, permitting "transmission of a variety of services, including private or common carrier communications"); *Amendment of Subpart C of Part 90 of the Commission's Rules to Permit Commercial Enterprises to be Licensed Directly in the Special Emergency Radio Services*, Report & Order, 3 FCC Rcd. 3677 (1998) (addressing whether private entrepreneurs could provide Special Emergency Radio Services, which had historically been limited to emergency service organizations); *International Communications Policies Governing Designation of Recognized Private Operating Agencies, Grants of IRUs in International Facilities and Assignment of Data Network Identification Codes*, Report & Order, 104 FCC 2d 208 (1986) (noting only that users of carriers that have already been designated non-carriers are eligible to hold private IRUs).

[56] 19 F.3d 1475 (D.C. Cir. 1994).

[57] *Id.* at 1483. Similarly, while the Commission did leave open the possibility that Section 259 of the Act could be implemented through private agreements, it did so in recognition of the fact that (1) Section 259 includes some services and functions not otherwise covered by Section 251; (2) carriers qualified to use Section 259 could still use the rights established under Section 251 to acquire telecommunications services; and (3) imputing a nondiscrimination requirement into Section 259, which is narrowly tailored to benefit certain kinds of carriers and certain areas that otherwise would lack service, "would be contrary to the clear mandate of section 259(b)(3)." *Implementation of Infrastructure Sharing Provisions in the Telecomms. Act of 1996*, Report & Order, 12 FCC Rcd. 5470, ¶¶ 8-9, 12 (1997); *see also id.* ¶ 12 (noting that if a carrier qualified to use Section 259 exercised its rights to use Section 251, common carrier obligations would apply).

of the cases that it cites involves Commission determinations that private carriage was appropriate because the service in question was not "telecommunications."[58]

The other cases that Verizon cited all deal with individualized services that lacked broad demand or were otherwise uniquely appropriate for individualized offerings. For example, Verizon cites to *Brightstar Communications Limited*,[59] for the proposition that some satellite carriers have been found to be "private carriers." But Verizon ignores that the Commission first found that it was consistent with the Satellite Act and the public interest to license a non-common carrier to provide service through the INTELSAT system.[60] Having found that the Commission could authorize private carriage through the INTELSAT system, the Commission concluded that the petitioner, who had no intention of "hold[ing] itself out to the public indifferently to carry whatever television transmissions come its way" (and had never done so) and who dealt solely in "agreements with customers . . . negotiated on a case-by-case basis and [which] vary according to rate, time, and frequency of transmission," could operate as a private carrier.[61] And it is utterly irrelevant that, when discussing *video programming* – which is

[58] *See* Verizon Appendix, Ex. C (citing *Computer and Communications Indus. Assoc. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (upholding *Computer II*) ("*CCIA*"); *Filing & Review of Open Network Architecture Plans*, Mem. Op. & Order, 4 FCC Rcd. 1 (1988)*; Amendment to Sections 64.702 of the Commission's Rules and Regulations – Phase II*, Mem. Op. & Order on Recon., 3 FCC Rcd. 1150 (1988); *Detariffing of Billing & Collection Servs.*, Report & Order, 102 FCC 2d 1150 (1986); *Public Service Comm'n of Maryland & Maryland People's Counsel Applications for Review of a Mem. Op. & Order*, Mem. Op. & Order, 4 FCC Rcd. 4000 (1989); *Audio Communications, Inc. Pet. for a Declaratory Ruling that the 900 Service Guidelines of US Sprint Communications Co. Violate Sections 201(a) & 202(a) of the Communications Act,* Mem. Op. & Order, 8 FCC Rcd. 8697 (CCB 1993)).

[59] *Licensing under Title III of the Communications Act of 1934, as amended, of Non-common Carrier Transmit/Receive Earth Stations Operating with the INTELSAT Global Communications Satellite System*, Declaratory Ruling, 8 FCC Rcd. 1387 (1993).

[60] *Id.* ¶¶ 9-19.

clearly not a telecommunications service – the Commission would note that "local cable companies and DBS operators provide their services on a non-common carrier basis."[62]

Lacking precedent, Verizon and Qwest shift to the abstract, noting that when the Commission has authorized private carriage, it has often ruled that the carrier lacked market power in the provision of the service in question. But that is hardly responsive to the problem at hand: *i.e.*, whether the Commission may reclassify as "private carriage" existing common carrier services for which there is widespread and general demand and, for the most part, no substitutes. In *Cox Cable Communications*, for example, the Commission determined that the cable-based services in question did not fall under Title II because those services would be offered only on an individualized basis.[63] Only then did the Commission note that there were no serious public interest concerns because the service would "compete only to a limited extent with

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[61] *Id.* ¶ 26. *Cf. Application of Loral/Qualcomm*, Order & Auth., 10 FCC Rcd. 2333, ¶ 22 (1995); *Application of Volunteers in Technical Assistance*, Order & Auth., 11 FCC Rcd. 1358 (1995); *Application of Motorola Satellite Communications Inc.*, Order & Auth., 10 FCC Rcd. 2268, ¶ 4 (1995); *Application of Orbital Communications Corp.*, Order & Auth., 9 FCC Rcd. 6476, ¶ 27 (1994); *National Rural Telecomms. Coop.*, Mem. Op. & Order, 7 FCC Rcd. 3213, ¶ 8 (1992); *NORLIGHT Request for Declaratory Ruling*, Mem. Op. & Order, 2 FCC Rcd. 5167 (1987). *See also Revision of Part 21 of the Commission's Rules*, Report & Order, 2 FCC Rcd. 5713, ¶ 92 (1987) (microwave distribution systems (MDS), such as digital electronic message services (DEMS) are generally not interconnected, but by their very nature lend themselves to a narrow, "local distribution function"); *General Tel. Co. of the Southwest*, Mem. Op. & Order, ¶¶ 4, 11 (1988) (microwave services at issue were supplied to "a stable clientele of Part 94 eligibles," whose communications were transmitted through "dedicated wire lines" and "through a private base exchange (PBX) switch"); *Amendment of Part 94 of the Commission's Rules and Regulations to Authorize Private Carrier Systems in the Private Operational-Fixed Microwave Radio Service*, 1985 FCC LEXIS 3605, ¶ 1 n.2 (1985) (emphasis added) (Part 94 specifically "governs the licensing and operation of *private* operational-fixed microwave systems in frequency bands at 928-929 MHz and above 952 MHz").

[62] *Amendment of Parts 2 & 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, First Report & Order & FNRPM, 16 FCC Rcd. 4096, ¶ 295 (2000).

traditional telephone exchange service and switched access service" and because there was no evidence of market power.[64] In any event, the Bells clearly do retain pervasive market power in the provision of standalone broadband transport – the record here clearly shows that neither ISPs nor business customers of such services generally have alternative sources of supply.

In contrast, in affirming the decision to remove both enhanced services and CPE from Title II regulation, the court of appeals expressly relied on the fact that the Commission had simultaneously removed the local carrier's (in that case the pre-breakup Bell System) ability to "gain an unfair advantage in the marketplace" by requiring AT&T to transfer control of those facilities to separate subsidiaries, *i.e.*, through the *Computer II* rules.[65] The Bells are offering no such protections in this case. To the contrary, the Bells seek to have their standalone broadband transport service removed from *both* Title II *and* the *Computer Inquiries* rules – thus retaining full control over those facilities, with no protections for the public from anticompetitive behavior.

B. The Commission's Rulings In The *Cable Modem Declaratory Ruling* Do Not Require Any Contrary Conclusion.

As a fallback, the Bells contend that the Commission must, as a matter of "regulatory parity" with cable Internet services reclassify wireline broadband transport services as private carriage. That is an odd request, given the Commission's recent finding that cable companies do not even provide broadband transport services, but instead provide only information services.[66]

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[63] *Cox Cable Communications, Commline, Inc., & Cox DTS, Inc. Petition for Decl. Ruling*, Mem. Op., Decl. Ruling, & Order, 102 FCC 2d 110, ¶¶ 24-25 (1985).

[64] *Id.* ¶ 28.

[65] *See CCIA*, 693 F.2d at 211.

[66] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling & Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, ¶ 40 (2002) ("We are

It is also difficult to see how exempting from regulation all Bell broadband transport services – many of which have nothing to do with ISPs or the public Internet – could be a tailored response to cable-based Internet services even if cable did provide broadband transport to ISPs.

Nonetheless, according to the Bells, to the extent that the Commission classifies any cable service as "private carriage," it also must classify standalone wireline broadband transmission services as "private carriage."[67] As the Commission has repeatedly held, however, each private carriage determination must turn on the particular circumstances of the services at issue, and there is thus no room for regulatory parity arguments in this context.

For example, to determine whether a carrier holds itself out as a common carrier it is necessary to examine, *inter alia*, how the service is provided, the types of contracts between the carrier and its customers, the length of the contract, and the extent to which those contracts are customer-specific.[68] And to determine whether a particular classification would be in the "public interest," as it is required to do, the Commission must assess the impact on competition and consumers of the service.[69] Here, there is no question that the differences between cable modem

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not aware of any cable modem service provider that has made a stand-alone offering of transmission for a fee directly to the public, or to such classes of users as to be effectively available to the public. Further, . . . there is no Commission requirement that such an offering be made") ("*Cable Modem Declaratory Ruling*").

[67] *See* BellSouth at 21-22; Qwest at 18-20; SBC at 8-15; Verizon at 23-30.

[68] *See, e.g., NORLIGHT Request for Declaratory Ruling*, Declaratory Ruling, 2 FCC Rcd. 132, ¶¶ 22-23 (1987) ("*NORLIGHT Declaratory Ruling*"); *see also Brightstar Communications* ¶ 24 (examining the "proposed television service offering to determine if there are indications as to how [the applicant] . . . will offer these services to the public" including evidence of "individualized decisions on whether and on what terms to deal, the establishment of medium-to-long term contracts, and the existence of a stable clientele"); *Cox Cable Communications* ¶¶ 24-25 (finding "long term relationships," "specialized" services, and "individualized determinations as to the ability and desirability of serving new customers").

[69] *See NORLIGHT Declaratory Ruling* ¶¶ 19-22; *see also Brightstar Communications* ¶ 26 (noting that common carriage classification would not be appropriate if the Commission has

services and standalone wireline broadband transmission services not only justify, but demand, different regulatory treatment of those platforms.

Unlike standalone wireline broadband transmission services, cable modem services are not currently, and never have been, subject to Title II regulation, and for good reason. Cable systems were not designed, and have never been operated, for point-to-point transmission (and, indeed, were not initially designed for two-way services at all). Given the current state of cable modem development, cable companies and ISPs are still exploring how to structure their arrangements in a way that is both scalable and commercially viable.[70] To be sure, some cable companies are experimenting with the provision of Internet access service using multiple ISPs. In these discrete cases, the Commission has found that it is unclear whether cable companies will in the future provide "standalone transport" or information services.[71] But to the extent that cable companies do provide standalone transport, they would, as the Commission noted, likely do so only on a private case-by-case basis.[72]

Moreover, the Commission recognized that, in those circumstances, a "private carriage" classification could be necessary to ensure the continued viability of new, two-way cable

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"concerns regarding public access to the service"); *Cox Cable Communications* ¶ 27 (analyzing the market and finding no adverse results from classifying carrier as common carriage).

[70] *See, e.g. Cable Modem Declaratory Ruling* ¶ 15 (explaining that cable operators still face numerous challenges to providing multiple-ISP services; for example, "[r]outing techniques . . . may be difficult for cable operators to manage and integrate and may present problems with regard to scalability"; "Cable operators may also face other technical challenges in a multiple-ISP environment, such as bandwidth management, subscriber IP address assignment management and network security").

[71] *See Cable Modem Declaratory Ruling* ¶ 54 (noting that, in these few instances, "[t]he record does not contain sufficient facts by which to make that determination").

[72] *See id.* ¶ 54.

services.[73] As explained by the Commission, if cable companies were forced to offer these still-developing services on a common carriage basis, they would likely "delay deployment of cable modem service."[74] That is because there are myriad technical and operational barriers that prevent cable companies from providing standalone broadband services on a non-discriminatory basis to the public.[75]

By contrast, there is no question that the Bells will continue to thrive under the common carriage framework for which their networks were designed and under which they have for decades offered broadband and other basic transmission services. Standalone wireline broadband transmission services are nothing more than faster versions of the same services provided by Bells *over the same facilities* and which have always been subject to Title II regulation. Moreover, non-discriminatory access to the Bells' standalone wireline broadband transmission services remains critical to competitive LECs', data LECs', and ISPs' ability to continue providing end-user customers with new innovative services. These entities have already made substantial investments in equipment and facilities in reliance on the Commission's existing regulatory framework, which requires the Bells to make their wireline broadband Internet services available to the public on a non-discriminatory basis.

IV. THE CLASSIFICATION OF WIRELINE BROADBAND SERVICES WILL HAVE NO EFFECT ON COMPETITIVE LECS' RIGHTS TO OBTAIN AND USE NETWORK ELEMENTS.

The comments confirm that the classification of incumbent LECs' wireline broadband services has no impact on competitive LECs' rights to purchase and use unbundled network elements. SBC and Verizon contend that it "follows" from the definition of a network element

[73] *Cable Modem Declaratory Ruling* ¶ 47 & n.176.

[74] *Id.*

[75] *Id.* ¶ 15.

as "a facility used in the provision of a telecommunications service" that "unless an incumbent local telephone company uses a given facility or feature to provide a telecommunications service, the company has no obligation to offer that facility or feature on an unbundled basis."[76] That is a *non sequitur*, as Qwest explains: "[w]ith respect to UNE rights under section 251(c)(3), the question . . . is whether the *requesting party* is a "telecommunications carrier" and whether the service *it* wishes to provide using the UNE at issue is a "telecommunications service."[77] Thus, even if an incumbent could lawfully cease providing telecommunications services over these facilities and began using them exclusively to provide information services,[78] competitive LECs may offer telecommunications services in which the entire loop is used for broadband transmission (as in an HDSL-based service) or in which broadband transmission and, at the competitive LEC's election, derived voice as well is provided over only the high-frequency portion of the loop (as in an ADSL-based service).

In short, the Act and the Commission's existing regulations unambiguously require network element access "that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element"[79] – narrowband or broadband – regardless of whether the incumbent LEC itself chooses to offer a telecommunications service using the requested element.

Verizon also asserts that if standalone wireline broadband transmission services are removed from Title II regulation, that would automatically remove "fiber" loops and the high-

[76] Verizon at 33; *see also* SBC at 31.

[77] Qwest at 21. *See also, e.g.,* WorldCom, *et al.*, at 72-78; AT&T at 29-37.

[78] *Notice* ¶ 61.

[79] 47 C.F.R. § 51.307(c).

frequency portion of all loops from unbundling or collocation requirements.[80] Again, Verizon is wrong on all counts.

The essential premise of Verizon's argument – that section 251(c)(3) requires that a network element be used *exclusively* to provide a telecommunications service – is incorrect. As WorldCom, the Competitive Telecommunications Assoc, and the Association for Local Telephone Services explain, "the only restriction Congress imposed on the use of UNEs was to require that they be utilized at least in part 'for the provision of a telecommunications service.'"[81] Accordingly, "[a]s long as a competitor uses the leased element in part to provide telecommunications service, the FCC cannot further limit the uses to which the carrier puts those elements."[82] Furthermore, because incumbent LECs themselves use their loops to provide these combinations of services, any effort to prevent a competitive LEC from likewise using leased loops to provide both broadband data and voice services would violate section 251(c)(3)'s nondiscrimination requirement.[83]

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[80] Verizon at 32-34.

[81] WorldCom, *et al*., at 75; *see also* AT&T at 35 ("once a carrier has lawfully obtained a local loop to provide a telecommunications service (*e.g.*, voice or standalone broadband transmission), it has exclusive control of that loop and is free to offer other narrowband and broadband services over that facility, whether or not the additional services also constitute telecommunications services.").

[82] WorldCom, *et al.*, at 75. *Accord Local Competition Order* ¶ 995 ("We also conclude that telecommunications carriers that have interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3), may offer information services through the same arrangement, so long as they are offering telecommunications through the same arrangement as well").

[83] *Local Competition Order* ¶ 995 ("Under a contrary conclusion, a competitor would be precluded from offering information services in competition with the incumbent LEC under the same arrangement, thus increasing the transaction cost for the competitor. We find this to be contrary to the pro-competitive spirit of the 1996 Act. By rejecting this outcome we provide competitors the opportunity to compete effectively with the incumbent by offering a full range of services to end users without having to provide some services inefficiently through distinct facilities or agreements"). Moreover, the existence of fiber does not automatically make a loop a "broadband" facility. Indeed, many loops used purely for voice services contain some fiber.

Just as importantly, if a competitive LEC is permitted access to the loop as a network element, it is and must be permitted access to the *entire* loop. This is particularly critical because the incumbent LECs themselves use loops – both the high-frequency and low-frequency portions – to provide service combinations of services. As such, barring competitive LECs from using the entire loop would be discriminatory, in direct contravention of section 251(c)(3), would violate "the pro-competitive spirit of the 1996 Act,"[84] and would leave competitors unable to compete with popular bundled services that only the incumbent LECs could provide.[85] It would also mean that competitive LECs would be unfairly (and unlawfully) forced to pay the entire economic cost for the entire loop,[86] while receiving a discriminatory limited ability to use that loop. Both law and policy thus compels the conclusion that competitive LECs – like incumbent LECs – must be permitted to use loops to provide both telecommunications services and information services.

Likewise, the classification of standalone wireline broadband services will not affect incumbent LECs' collocation obligations. The right to collocate is for the purpose of interconnection and access to network elements.[87] Therefore, for the same reason that the "broadband" facilities that Verizon seeks to withhold are network elements – *i.e.,* as long as they

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The same is true of the high-frequency portion of loop – just because it can be used for "broadband services" does not mean that it is an exclusively "broadband" facility.

[84] *Id*.

[85] Additionally, as AT&T noted in its initial comments (at 34), the *UNE Remand Order* makes clear that access to unbundled network facilities – such as loops – entitles a competitive LEC "to exclusive use of that facility for a period of time," but that a carrier may "purchase[ ] access to a feature, function, or capability of a facility." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report & Order, 15 FCC Rcd. 3696, ¶ 268 (1999).

[86] 47 U.S.C. § 252(d)(1).

[87] 47 U.S.C. § 251(c)(6).

have been or customarily are used for the provision of telecommunications – a competitive LEC that leases those elements may obtain collocation to access them.

V. THE BELLS' POLICY ARGUMENTS ARE IRRELEVANT AND BASELESS.

Unable to demonstrate that standalone wireline broadband transmission services should be reclassified as "private carriage" as a matter of law, the Bells claim that Title II obligations are both harmful and unnecessary as a matter of policy. As explained below, however, the regulations at issue in this proceeding will not reduce the Bells' incentive to invest in broadband infrastructure – in fact, by permitting competition to grow, unbundling and tariffed resale regulations will *increase* the incentive of incumbent LECs, competitive LECs, and ISPs alike to invest in broadband deployment (Part V.A.). The Bells' assertion that such regulations are unnecessary ignores the facts, for the Bells have both the incentive and ability to exercise market power to impede broadband competition (Part V.B.). Where, as here, the incumbent LECs control facilities that give them the opportunity to restrict output or raise rivals' costs in anticompetitive ways, the Commission has concluded that regulation is not only appropriate, but necessary.[88] Lastly, the fact that this market power-focused analysis results in different regulatory treatment for the Bells than for alternative broadband providers is no justification for eliminating existing unbundling and wholesale access regulations (Part V.C.).

A. Broadband Investment. Echoing their comments in the Triennial UNE Review proceeding, the Bells attack the Commission's unbundling rules, arguing that requiring them to "share" their facilities reduces their incentive to invest in new networks, particularly broadband networks.[89] Additionally, the Bells say that unbundling impedes the deployment of broadband

[88] *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271, ¶ 27 (1995).

[89] BellSouth at 4; SBC at 7, 13; Verizon at 21.

networks because it is "costly" to implement.[90] Neither contention can withstand review.[91]

Unbundling does not impair the incumbent LECs' incentives to innovate. The Bells assert that unbundling obligations deter them from making broadband investments that will allow them to offer services because when the necessary demand exists, competitive LECs will purportedly be able to "free ride" on the Bells' investment and offer their own competing services over the Bells' facilities without having taken or assumed the risk that the incumbent LECs assumed in making the infrastructure investments in the first instance.[92] There is, however, no "free riding" here; the Bells are permitted to charge cost-based rates for the access that they provide. And rather than avoiding risk, the rates competitive LECs must pay include a risk adjusted return on capital.

For these reasons, the Bells are ultimately forced to concede that, at bottom, their complaint is not against unbundling *per se*, but the level of the prices they can charge for unbundled access. As Qwest contends, "the effect of unbundling requirements on both CLECs' and *incumbent LEC*s' investment incentives . . . depends to a large extent on how the Commission's pricing rules are interpreted and applied."[93] Thus, the Bells renew their now-

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[90] SBC at 24; Verizon at 20-21.

[91] Relatedly, Verizon also complains about the costs of "retail" regulation, particularly the "costs" of having to file tariffs, that is not at issue in this proceeding. *See* Verizon at 21. AT&T in the ILEC Broadband Dominance Proceeding explained in detail why preservation of existing tariffing requirements "perform[s] an invaluable, pro-competitive role by providing needed transparency and by reducing transaction costs." AT&T ILEC Broadband Dominance Comments at 51-52. AT&T also explained why Verizon's claims about the "costs" of having to file tariffs were greatly exaggerated. AT&T ILEC Broadband Dominance Reply Comments at 30-31.

[92] Verizon at 21-22; *id.*, Kahn-Tardiff Dec. ¶¶ 18, 24-38.

[93] Comments of Qwest Communications International, CC Docket No. 96-98, at 50-51 (filed Apr. 5, 2002) (emphasis added) ("Qwest Triennial UNE Review Comments"); *see also* Verizon, Kahn-Tardiff Dec. ¶¶ 30-31, 41.

familiar claim that TELRIC-based rates do not provide sufficient recovery to justify the risks of deploying broadband facilities while allowing competitive LECs to purchase access at "bare-bones" prices.[94]

They are wrong. As the Supreme Court recognized in *Verizon Communications Inc*. v. *FCC*, the depreciation and cost of capital components of the TELRIC rates compensate incumbent LECs for *all* the risks that they assume in deploying facilities. "TELRIC itself prescribes not fixed percentage rate as risk-adjusted capital costs and recognizes no particular useful life as a basis for calculating depreciation costs" and, therefore, may be "adjusted upward if the incumbents demonstrate the need."[95] It is thus "commonsense . . . that so long as TELRIC brings about some competition, incumbents will continue to have incentives to invest and improve their services to hold on to their existing customer base."[96] As Professor Willig explained, to the extent that incumbent LECs in fact face greater costs in deploying broadband facilities, either because of increased risk in deploying broadband facilities due to competition or because of the uncertainty whether consumers will be willing to pay sufficient prices for the services that the investments will allow, one could still *not* conclude that unbundling would materially affect the pace or scope of incumbent LEC investment.[97] TELRIC is sufficiently flexible to account for any increase in risk that the incumbent LECs face as a result of deploying broadband facilities.

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[94] Verizon, Kahn-Tardiff Dec. ¶ 31.

[95] *Verizon Communications*, 122 S. Ct. at 1677. See also *id.* at 1678 (because "TELRIC rates are calculated on the basis of individual elements . . . TELRIC rates leave plenty of room for differences in the appropriate depreciation rates and risk-adjusted capital costs depending on the nature and technology of the specific elements to be prices.").

[96] *Id*. at 1676 n.33.

[97] Willig Dec. ¶¶ 76-84.

Application of these principles to the current and planned NGDLC investments being made by the incumbent LECs is straight-forward. As noted above, current TELRIC rates already assume fiber feeder is used on all loops over 18,000 feet and therefore reflects the costs of a DSL-capable network. All that needs to be accounted for then is the additional cost of the electronics necessary to support DSL-based services, which, as the incumbent LECs themselves acknowledge, are "modest."[98]

Nor do basic TELRIC principles change simply because the investment at issue is "fiber to the home."[99] To the extent the forward-looking risks and costs of deploying all-fiber loops warrant, competitive LECs would pay higher rates when they lease those loops to provide broadband than when they lease loops to provide voice grade service. Indeed, if the incumbent LECs were truly planning to deploy "FTTH" on a wide-spread basis, then their argument against TELRIC clearly evaporates. The incumbent LECs' historic objection to TELRIC, echoed in their comments here, is that it denies them recovery of their *historic book costs* because it sets rates based on the efficient costs of replacing the loop and other facilities (and to connect them to incumbent LECs' existing wire centers).[100] But this objection has no application to the hypothetical FTTH systems that they refer to here – or to anything else that is actually a totally "new" facility. Assuming the Bells act efficiently (as they claim that they will), their TELRIC costs of deploying a FTTH system should be about the *same* as their book costs – the forward-looking, economic costs of deploying a truly new state-of-the-art all-fiber network (given the

[98] Duane Ackerman, *Remarks at Goldman Sachs Communicopia Conference* (Oct. 3, 2001). These additional costs would, of course, reflect the relevant cost of capital for the electronics, which in turn would reflect any increased risk from deploying DSL electronics.

[99] Willig Dec. ¶ 84.

constraint of taking existing wire centers as given) should be virtually identical to the *actual* costs that an efficient incumbent incurs.[101] The only way that a properly calculated TELRIC rate would be significantly below a Bell's actual costs is if the incumbent were grossly inefficient in the procurement, deployment, or design of the network at the time it was built – a problem that the Bells could, and should, avoid.[102]

In sum, although TELRIC does not provide the Bells with monopoly-level returns, it nonetheless provides them with a return that reflects the risks that they face in providing wholesale facilities to competitors. For these reasons, the Bells plainly have not supported their claims that TELRIC-based rates will necessarily fail to compensate them adequately for upgrades (even assuming such upgrades actually result in higher costs), and, without more, there is no basis for assuming that a requirement to lease UNEs at risk-adjusted competitive market rates will discourage any efficient investments. This is also the conclusion reached by the OECD in its recent analysis of local loop unbundling:

> [I]t is argued that incumbents will have little interest in upgrading their existing facilities if they have to open them to competitors. The recent history of ADSL upgrading by incumbents has shown that this argument does not hold. . . . Evidence on ADSL deployment has shown that it is in those countries where competition is weak . . . that broadband has not developed.[103]

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[100] *See* Verizon, Kahn-Tardiff Dec. ¶ 29 ("This method, the estimated total-service long-run incremental costs (TELRIC) of a hypothetical most efficient new entrant, writing as if it were on a blank slate, essential ignores the actual incremental costs of the incumbent suppliers.").

[101] Willig Dec. ¶ 84.

[102] Indeed, the Supreme Court has explained how TELRIC provides incentives for both incumbent LECs and competitors to increase efficiency. *See Verizon*, 122 S. Ct. at 1668-70.

[103] Organization for Economic Co-operation & Development, Working Party on Telecomms. & Information Serv. Policies, *Developments In Local Loop Unbundling*, at 15, ¶ 47 (May 2, 2002) ("*OECD Unbundling White Paper*").

The surest way to promote the deployment of "advanced telecommunications capability to all Americans," therefore, is for the Commission to eliminate existing barriers that prevent competitors from gaining non-discriminatory access to local loops to provide broadband services.

Unbundling of the unified loops is not costly. Verizon says unbundled loop access increases incumbent LECs' costs because, where incumbent LECs deploy NGDLC, competitive LECs may collocate line cards at remote terminals ("RTs").[104] Even if these claims were supported by sworn engineering affidavits, which they are not, they do not provide a basis for denying competitive LECs access to unbundled loops to provide broadband services. As AT&T has explained in the Triennial UNE Review proceeding, loops employing NGDLC technology can be unbundled without the need for line card collocation at RTs.[105] Under the "unified loop" access proposed by AT&T and other carriers, competitive LECs would use the line cards the *incumbent LEC has chosen* to deploy. No collocation of equipment at the RT is involved; a competitive LEC would instead receive access to the packets of its customers on the port side of the Optical Concentration Device ("OCD") (or its functional equivalent) in the incumbent LEC central office. This does not impose any significant cost increases on the incumbent LEC or interfere with the operation of the network.

That unified loop unbundling does not impose significant costs on incumbent LECs is confirmed by SBC's statements and actions in connection with Project Pronto. In particular, in the *Project Pronto Waiver Order*, SBC itself proposed competitive LEC access to SBC line

[104] Verizon at 20-21.

[105] Comments of AT&T, CC Docket No. 01-338, at 163-203 (Apr. 5, 2002).

cards and in central offices at an OCD port.[106] In making this proposal, SBC assured the Commission that it was technically feasible and that competitive LECs would be able to obtain all the features, functions, and capabilities of the loop.[107]

SBC, on the other hand, says that the *Computer Inquiries* rules are costly because they prevent it from entering into "innovative" arrangements[108] That is nonsense. To the extent that SBC wants to offer wholesale access to broadband transport with different terms and conditions, the *Computer Inquiries* rules do not stand in SBC's way, so long as it tariffs those wholesale arrangements and makes them generally available (and also continues to tariff the any particular services required by the Commission's rules). For example, "contract tariffs" have routinely been used in numerous contexts, including services provided by incumbent LECs, to permit individualized arrangements between a carrier and a customer, while at the same time ensuring that all similarly situated customers are treated equally.[109]

Thus, it appears that what SBC really wants to do is to leverage its bottleneck transmission facilities into the enhanced services market. Most significantly, absent non-discrimination provisions, SBC could – and no doubt would – use its last-mile transport facilities to gain power in the ISP market even if it were not advantaging its own affiliate (which, but for the *Computer Inquiries* non-discrimination obligations that it seeks to gut, it could also do). In particular, SBC could advantage the competitive position of an unaffiliated ISP against other ISP

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[106] *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, Second Mem. Op. & Order, 15 FCC Rcd. 17521, ¶¶ 23-25 (2000).

[107] *Id.* ¶ 25. That said, in its proposal, SBC sought to place the Project Pronto commitments under the Merger Conditions dealing with services – rather than as UNEs – despite the fact that it was technically feasible for SBC to provide these commitments as UNEs. *See* AT&T Corp. Ex Parte, Docket No. 98-141, at 3 (filed Aug 23, 2000).

[108] SBC at 25.

[109] *See, e.g.*, 47 C.F.R. § 61.55.

rivals in return for a healthy share of the favored ISPs' enhanced earnings. As the Commission has recognized, the *Computer Inquiries* regime "prohibit[s] discriminatory network access" precisely in order to prevent such "'bottleneck' leverage."[110]

B. Market Power. The Bells also claim that common carriage and *Computer Inquiries* regulation of standalone wireline broadband transmission services should be lifted because the Bells no longer have market power in the retail market for broadband services. The "centerpiece" of the Bells' advocacy is the testimony of nearly 50 economists. Although the credentials of these economists are quite impressive, the analysis that they provide is not. In particular, the economists proffer two unremarkable observations. First, that wholesale access regulation can be costly.[111] Second, that competition provides incentives for carriers to enter into either wholesale arrangements with unaffiliated ISPs or with other competing carriers.[112] AT&T, of course, does not dispute that where markets are workably competitive, regulatory intervention by the Commission in the market is generally unnecessary.[113] But the critical question here is whether *in fact* broadband competition is sufficiently developed to provide

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[110] *Implementation of the Telecommunications Act of 1996,* Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd. 8061, ¶ 184 (1998); *see also Rules and Policies on Foreign Participation in the U.S. Telecommunications Markets,* Order on Recon., 15 FCC Rcd. 18158, ¶ 16 (2000) (BOCs "may leverage that bottleneck control [of local facilities] into their in-region, interLATA interexchange markets and engage in anticompetitive cross-subsidization or discrimination.").

[111] Statement of 43 Economists ¶ 10; Verizon Lexecon Economists Dec. ¶¶ 15-17.

[112] *See* Statement of 43 Economists ¶ 12 ("the more competitive the market is, the more sufficient are the incentives of facilities-based providers to negotiate such arrangements without compulsion."); *see also* Verizon Lexecon Economists Dec. ¶¶ 19-20.

[113] *Accord Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review - Review of Computer III and ONA Safeguards and Requirements*, Further Notice of Proposed Rulemaking, 13 FCC Rcd. 6040, ¶ 49 (1998) ("Competition in the local exchange and exchange access market is the best safeguard against anticompetitive behavior.").

incumbent LECs with incentive to maximize the deployment of broadband networks and provide access to their networks (either to competing carriers or unaffiliated ISPs) at rates that approximate the cost of such access. On that score, the economists simply assert without any analysis that such competition exists.[114]

As explained below, a rigorous examination of the market structure shows that Bells have both the incentive and ability to exercise market power to impede broadband competition.[115] This is true both for broadband services sold to large business and at the mass market level. And where, as here, the incumbent LECs control facilities that give them the opportunity to restrict output or raise rivals' costs in anticompetitive ways, the Commission has concluded that regulation is not only appropriate, but necessary.[116]

There is no question that Bells are dominant with respect to broadband services provided to large businesses.[117] The principal evidence that has been offered by the Bells to the contrary – that they only have a small share of the national long-distance ATM and Frame Relay markets – is simply irrelevant.[118] As a preliminary matter, the Bells still own most of the loops over which those services are being offered, which means that the Bells' market share for the retail provision of the services offered over those loops says nothing about whether there are alternatives to those

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[114] *See* Statement of 43 Economists ¶ 11; Verizon Lexecon Economists Dec. ¶ 19.

[115] For the reasons explained above, the existence of "retail" competition is utterly irrelevant to the *Computer Inquiries* rules, which are necessary because of the lack of *wholesale* alternatives available to ISPs. The economists utterly fail to recognize this critical point. That said, as explained below, there is not effective retail competition for broadband services across all geographic areas or customer classes.

[116] *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271, ¶ 27 (1995).

[117] *See* AT&T ILEC Broadband Dominance Comments at 19-36; AT&T ILEC Broadband Dominance Reply Comments at 10-15; Declaration of Robert D. Willig, CC Docket No. 01-337, ¶¶ 47-76 (filed March 1, 2002) ("Willig ILEC Broadband Dominance Dec.").

loops. And, in any event, the reason why the Bells have low market shares in the "national" Frame Relay and ATM service markets is that they have been largely confined by section 271 to providing such services on an intraLATA or "local" basis. Tellingly, when the Frame Relay and ATM markets are examined on a *local* basis, the Bells have more than a 90% share of that market,[119] suggesting that where the Bells are permitted to provide such services, they have in fact been able to use their control of last-mile business loops to gain a dominant position.

Nor are the Bells likely to face *facilities-based* competition in any of these markets. As AT&T explained in the Triennial UNE Review Proceeding, potential facilities-based competitors face numerous hurdles to deploying high-capacity loops and transport facilities to serve even large businesses.[120] Even in the rare circumstances where building such facilities could theoretically be justified, practical considerations such as the need to obtain necessary rights of way and collocation arrangements still "impair" new entrants' ability to use their own facilities to offer service.[121]

Only the details, not the conclusion, change with regard to mass market broadband services.[122] The enormous price increases imposed by the Bells after the collapse of the data

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[118] *See* Verizon, Broadband Report at 29.

[119] *See* IDC, *U.S. Packet/Cell-Based Services Market Forecast and Analysis*, 2000-2005, at 34, 69 (2001).

[120] *See* AT&T Triennial UNE Review Comments at 123-58.

[121] *Id. See also* Comments of NYDPS, CC Docket No. 96-98, at 5 (filed Apr. 5, 2002) ("Verizon continues to be the dominant provider of high-capacity loops used to provide services to large volume customers").

[122] *See* AT&T ILEC Broadband Dominance Comments at 36-51; AT&T Broadband Dominance Reply Comments at 15-27; Willig ILEC Broadband Dominance Dec. ¶¶ 77-137. Of course, as Professor Willig has explained, the relevant market for Internet access includes both narrowband and broadband access. Willig ILEC Broadband Dominance Dec. ¶¶ 123-136.

LEC industry are the complete answer to the Bells' claimed lack of market power.[123] Analysts widely agree that it was the recent, precipitous decline in intramodal competition – caused by the Bells' well-documented campaigns of delay, discrimination, and outright refusals to comply with unbundling obligations – that permitted the Bells to raise prices for their high-speed Internet access services.[124] And this starkly contrasts with the recent initiative by the one surviving large "data LEC" to *reduce* mass-market DSL prices.[125]

More broadly, one reason why intermodal competition has not checked Bell market power is that alternative broadband providers are not ubiquitous. Contrary to the Bells' claims, satellite and fixed wireless services are not capable now or in the foreseeable future of checking Bell market power. Satellite-based services have attracted few subscribers.[126] And while the Bells predict that this trend will reverse in the future,[127] major players have given up on this

[123] AT&T at 75-76; Willig Dec. ¶¶ 37-38.

[124] *See Broadband Intelligence Report* at 1 ("[T]he first half of this year witnessed a major shakeout among DSL wholesalers and independent ISPs. In its wake came a reversal of last year's downward pricing pressure."); *RHK Broadband Access Report* at 1 ("Competition for DSL subscribers in the telecom market is non-existent as more CLECs and DLECs become insolvent."); IDC, *US DSL Market Shares by Vendor, 1H01*, at 2 (Aug. 2001) ("Now that upstart competitors, such as defunct NorthPoint Communications, no longer threaten the ILECs, the race for DSL subscribers has slowed . . . The ILECs now dominate the US DSL market, and with a dearth of competition, the ILECs no longer have an incentive to aggressively market and deploy DSL service."); Salomon Smith Barney, *Communications Components*, at 2 (Nov. 23, 2001) ("Perhaps most importantly, the fall of the competitive local exchange carriers (CLECs) has given the ILECs room to retire to 'Bell Standard Time' after years of trying to move in sync with 'Internet Time.' The result has been lower than expected DSL rollout rates in the US. In contrast, the worldwide ADSL sky has not fallen. Deployment has gone much more smoothly in several regions such as South Korea, Japan, and most of Europe.").

[125] *See* Press Release, "Covad Reduces Price of Consumer Broadband to $39.95 per Month with $21.95 Introductory Price" (June 19, 2002).

[126] Willig Dec. ¶ 28.

[127] *Id.* ¶¶ 28-30.

technology.[128] The Bells likewise overstate the competition offered by fixed wireless carriers.[129] Fixed wireless technology has failed to gain even a toehold in the market – as even the Bell's Broadband Report acknowledges.[130] The largest holders of multichannel multipoint distribution services licenses ("MMDS"), Sprint and WorldCom, have put on hold initially aggressive plans to deploy fixed wireless systems, and the largest holders of Local Multipoint Distribution Service ("LMDS") spectrum in the United States have gone bankrupt.[131]

To be sure, cable operators have aggressively deployed broadband networks and compete head-to-head with Bell DSL offerings in some areas.[132] But this competition does not mean that the Bells will price their services at competitive levels. *First*, because cable systems were deployed to offer video programming services to residential customers, cable systems generally do not pass by businesses.[133] As a result, DSL operators face only token competition from cable

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[128] For example, EchoStar frankly calls its investment in the StarBand venture a "$100 million mistake," *id.*, and has stopped marketing StarBand high-speed Internet access service, Andy Pasztor, *EchoStar Will No Longer Offer Web Via Satellite*, The Wall Street Journal, at B5 (Apr. 5, 2002). Instead, EchoStar has begun cross-marketing SBC's DSL-based services to its customers. *See* Margaret Kane, *SBC Connects With DSL Subscribers*, CNET News.com (Apr. 18, 2002). Similarly, WildBlue, which had raised $100 million from investors to provide high-speed Internet access to customers in rural parts of the United States, has put on hold its attempt to build and deploy satellites. *See* Jennifer Beauprez, *WildBlue's Net Satellite On Hold For Lack Of Funds*, The Denver Post, at C1 (March 7, 2002). And just recently, Pegasus Communications announced that it has given up on aggressively pursuing satellite-based Internet access after attracting only 5100 subscribers and suffering a $15.7 million operating loss in fiscal 2001. Communications Daily at 10 (May 3, 2002).

[129] *See* Verizon, Broadband Report at 7.

[130] *Id.* at 15.

[131] Willig Dec. ¶ 29. Even if carriers find a way to deploy fixed wireless profitably, it will never be ubiquitous. Because of line-of-sight requirements, the "maximum penetration of fixed wireless services in larger markets will be limited to five to ten percent." WorldCom, Kelley Dec. ¶ 40.

[132] SBC at 21; Verizon at 24-25.

[133] *Third Section 706 Report* ¶ 42 ("[O]ur data collection shows that cable high-speed services are delivered primarily to residential and small business customers, while high-speed services

operators in seeking to provide high-speed Internet access services to businesses.[134] This lack of cable competition in the business market has allowed Bells to charge small businesses substantially more for the same type of service that they sell consumers.[135] For instance, Qwest's 256 kbps DSL service is $99 per month for businesses who sign up for a one-year contract while residential customers can purchase the same 256 kbps for $39.95.[136]

Second, as the Bell's own economists concede with regard to cable modem and DSL offerings, "[t]he geographic scope of the market for broadband access is local."[137] Thus, there are numerous relevant markets where Bell DSL offerings face *no competition*. Indeed, "forty-

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over fiber and other traditional wireline technologies still tend to be delivered to large business and institutional customers."); *id.* ¶ 45 ("Residential and small business subscribers, not surprisingly, account for over 96 percent of the reported high-speed lines delivered over cable systems. This is consistent with our understanding that most cable systems are currently deployed in primarily residential areas."); Ernie Bergstrom, *et al*, Cahners In-Stat Group, The Broadband Marathon: Access Technologies Jockey for Subscribers, at 14 (June 2001) ("One drawback to cable modem's growth prospects is the service's low business penetration rate. Unlike DSL's ubiquitous copper telephone lines, relatively few established business parks and corporate offices have ready access to the local cable operator's [hybrid fiber-coaxial] network.").

[134] Willig Dec. ¶ 24; *see also* WorldCom at 36.

[135] *Compare* http://qwest.com/residential/products/dsl/index.html (Qwest offers 256 kbps residential DSL at $39.95) *with* http://www.qdslonline.com/prod/offer.html (Qwest offers 256 kbps business DSL at $139 per month). *Compare* http://www.swbell.com/DSL_new/content/0,5289,4,00.html (SBC offers 1.5 Mbps/128kbps residential DSL at $29.95 for first six months) *with* http://www.swbell.com/DSL_new/content/0,5289,52,00.html (SBC offers 1.5 Mbps/128kbps business DSL at $49.95). *Compare* http://www.fastaccess.com/consumer/blsc_pricing.jsp (BellSouth offers 1.5 Mbps/128kbps residential DSL at $49.95) *with* http://www.fastaccess.com/content/ products.jsp (BellSouth offers 1.5 Mbps/128kbps business DSL at $79.95). *Compare* http://www22.verizon.com/ForYourHome/dsl/order/ NLF_vzolproducts prequalify.asp (Verizon offers 1.5 Mbps/128kbps residential DSL at $59.95) *with* http://dslonline.bellatlantic.net/dsl/orderdsl.jsp?promotionCode=GBCOM&customerID =gbsdotcom&customerPassword=gbsdotcom&NPA=212&NXX=686&NUMB=2546 (Verizon offers 1.5 Mbps/128kbps business DSL at $69.95).

[136] Pricing information located on www.qwest.com on June 30, 2002.

five percent of Californians that live in cities with broadband service have DSL service as their only broadband option."[138]

Third, even in those instances where Bell broadband services compete head-to-head with a cable provider, that does not mean that Bells will invest in and price DSL services at competitive levels. As entrenched monopolists, Bells do not have incentives to invest in broadband whenever and wherever they could expect to earn sufficient revenues from broadband services to attain a market return on that investment.[139] To the contrary, when new technology will undercut the value of the Bell monopolist's existing assets it will resist investing in it, and if it is forced to do so, it will seek to slow its introduction and use and/or to maintain a high price.[140]

This basic economic principle refutes SBC's claim that the Bells "ha[ve] every incentive to maximize the sale of its broadband services."[141] DSL is a technology that increases the bandwidth of the local loop and that allows voice and higher-speed data transmission to occur simultaneously over a single line. As such, these services eliminate the need for many customers' second telephone lines – just one narrowband service from which the Bells earn hefty

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[137] Declaration of Robert Harris, CC Docket No. 01-337, ¶ 6 (attached to Reply Comments of BellSouth, filed Apr. 22, 2002).

[138] California at 28; *see also* Reply Comments of WorldCom, CC Docket No. 01-337, at 3-4 (filed April 22, 2002).

[139] Willig Dec. ¶ 32.

[140] *Id.*

[141] SBC at 28.

premiums.[142] And the Bells apparently estimate that as many as *three quarters* of their DSL customers cancel their Bell-supplied second lines.[143]

Because DSL cannibalizes existing, higher margin services, Bells have been followers rather than leaders when it comes to broadband. As the AISPA colorfully puts it, "[w]ith T1 lines averaging $1,000 per month, a $50 monthly DSL account was a pitiful exchange."[144] Hence, the Bells let DSL technology gather dust when it could have been deployed in the 1980s.[145] Instead, they introduced DSL technology only after cable operators began to offer high-speed cable modem services – and after the "data LECs" (*e.g.*, Covad, Rhythms, NorthPoint) began offering DSL-based services by attaching their own electronic equipment to loops leased from Bells.[146] And subsequently, when many of those competitive data LECs stumbled and fell, the Bells responded by raising the prices of their DSL services (despite the presence of cable competition in some markets).[147] Indeed, with the demise of intramodal competition, the Bells feel no compulsion to match cable modem rates and now uniformly

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[142] Willig Dec. ¶ 33. Relatedly, DSL-based services can also be a substitute for high margin T1.5 or ISDN services used by business customers. *Id.* ¶ 34.

[143] *See* Goldman Sachs Telecom Services (United States), Report, *DSL Under A Microscope*, at 15 (June 11, 2002) ("a negative side effect of adding a DSL subscriber is the potential loss of a second line that the customer had previously subscribed to. SBC estimates that as much as one-half of customers with second lines that sign up for DSL service disconnect their second lines, Verizon estimates that this figure is closer to three-quarters. Although on the surface, adding a $50 revenue stream per month, while sacrificing a $25 per month second line revenue stream may seem like a positive tradeoff, the underlying economics may not lead to the same conclusion, particularly if we are only at the first-year effect. Second lines generate only $25 per month in revenue and come at a very low incremental cost to the provider, implying very high returns.").

[144] American ISP Assoc. at 4.

[145] Willig Dec. ¶ 35; American ISP Assoc. at 4; Covad at 33.

[146] Willig Dec. ¶¶ 37-39.

[147] *Id.*

charge more for their DSL service than cable operators charged for comparable or superior service.[148]

Accordingly, continued application of the Act's unbundling and nondiscrimination obligations in the wireline broadband context remains necessary. Vibrant intramodal DSL-based competition enabled by the Act's unbundling obligations is critical to check the incumbent LECs' market power by giving consumers voice/DSL alternatives from multiple carriers who would not have to match the incumbent LECs' price increases.[149] As the Supreme Court recently noted, it is "commonsense" – at least, to everyone but Verizon[150] – "that so long as [the Commission's unbundling policies] bring[] about some competition, incumbents will continue to have incentives to invest and improve their services to hold on to their existing customer base."[151]

Continued unbundling requirements also are necessary to protect *voice* competition. For example, without access to the high-frequency portion of the loop, competitive LECs will be foreclosed altogether from competing for the increasing number of customers that want voice and data services over a single line.[152] Likewise, denying competitive LECs access to the high-frequency portion of the loops they lease would also directly impede voice competition, because voice services can be provided over the high-frequency portion of the loop.[153] Such offerings

[148] *See* Willig Dec. ¶¶ 37-38.

[149] *Id.* ¶ 39.

[150] *See* Verizon at 18 ("Applying Title II regulation to local telephone companies . . . can thus result in a *reduction* in competition.") (emphasis in original).

[151] *Verizon Communications*, 122 S. Ct. at 1676 n.33; *see also OECD Unbundling White Paper* at 12, ¶ 35 (concluding that "prices for broadband are lower, and service levels are higher, in countries where competition is highest").

[152] Willig Dec. ¶ 43.

[153] *Id.* ¶ 45.

could not be made, however, if competitive LECs are denied access to the high-frequency portion of the loop, as the Bells urge.

Worse yet, even as to the declining numbers of customers willing to buy a voice-only offering, competitive LECs would be placed at a significant cost disadvantage *vis-a-vis* incumbent LECs. State commissions already set loop rates assuming the existence of "clean loops" (*i.e.*, loops without bridge taps and load coils) and that fiber feeder is used on all loops over 18,000 feet.[154] Some states have gone farther and assumed that TELRIC requires all-fiber feeder regardless of loop length.[155] Thus, TELRIC rates already reflect the costs of a network that can be equipped to support DSL-based service to *every* customer, and that would provide, even on the longest such loops, bandwidth generally greater than in current Bell offerings. But if the Bells' proposals are granted, competitive LECs will be put in the competitively untenable position of having to pay for loop capabilities that they would not be permitted to use.

C. Regulatory Parity. "Regulatory parity" has never meant, and rationally could not mean, more than an "analytical framework that is consistent, to the extent possible, across multiple platforms."[156] Critically, the *Notice* itself recognizes that "legal, market, or technological distinctions may *require* different regulatory requirements between platforms."[157]

In stark contrast to the Bells, access regulation of cable operators would be clearly inappropriate under a consistent market power framework. The high-speed services offered by

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[154] *Id.* ¶ 79.

[155] *See Verizon Communications*, 122 S. Ct. at 1678 ("The New York Public Service Commission, for example, used the cost of the more expensive fiber-optic cable as the basis for its TELRIC loop fixed rates, notwithstanding the fact that competitors argued that the cheaper copper-wire loop was more efficient for voice communications and should have been the underlying valuation for loop rates.").

[156] *Notice* ¶ 6.

[157] *Id.* ¶ 7 (emphasis added).

cable providers do not cannibalize existing cable offerings. As a result, these carriers have unmitigated incentives to increase broadband deployment and revenues by deploying broadband services broadly and pricing those services in order to attract customers away from the wireline-based services (broadband *or* narrowband).[158]

SBC's attempt to raise the specter of cross-subsidization by asserting that cable operators can use video programming revenues to "cross-subsidize" cable modem services is absurd.[159] Unlike the Bells' core telephone service, cable's video services are now subject to substantial competition from DBS and other competitors that have no need for access to cable facilities and that are outpacing cable without viable broadband Internet offerings. Driven by DBS, non-cable multichannel video distributors ("MVPDs") already serve approximately 23% of MVPD customers nationwide, and the non-cable share of the MVPD business continues to experience an annual growth rate of nearly 20%.[160] Most of this growth has come from luring away existing cable subscribers.[161] And this competition is national in scope, for there are two facilities-based DBS providers that have the ability and capacity to serve virtually each and every cable

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[158] Willig Dec. ¶ 102.

[159] SBC at 22.

[160] *See* Paul Kagan Assocs., *Media Index Database*, Kagan Media Money, at 11 (June 26, 2001) ("*Kagan Media Database*"); *see also* Josh Bernhoff et al., Forrester Research, Inc., *How Cable TV Can Beat Satellite 6* (April 2002) ("Nearly two-thirds of new satellite subscribers said that they had cable last year, and 22% report that they had digital cable before they switched to the dish.") (emphasis removed); DirecTV Comments, CS Dkt. No. 01-129, at 11 (filed Aug. 3, 2001) ("According to internal subscriber data, roughly half of DIRECTV customers were cable subscribers at the time that they first subscribed to DIRECTV. Of these, the majority cancelled their cable subscription once they activated DIRECTV.").

[161] *See* J.D. Power & Assocs., *2001 Syndicated Cable/Satellite TV Customer Satisfaction Study* (Sept. 2001); Declaration of Robert Willig, CS Docket No. 01-348, ¶ 11 (filed December 3, 2001) ("Willig EchoStar-DirecTV Merger Dec.") (citing evidence).

subscriber in the United States.[162] Thus, in *every* local market, cable operators face at least two successful facilities-based competitors, and in many markets they face several other non-cable competitors as well.[163] Ironically, because of this very competition, basic cable rates in numerous markets have been deregulated – which means that SBC's "cross-subsidization" scare is, by definition, impossible.[164]

The only support SBC offers for its "cross-subsidization" theory is the fact that some cable operators have increased their rates faster than the rate of inflation.[165] SBC ignores the fact that the cost of the video programming purchased by cable operators – which is a significant component of their costs[166] – have increased much faster than cable rates.[167] According to the

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[162] AT&T at 79.

[163] *Id.*

[164] *See* SBC at 21 (arguing that cross-subsidization is only a concern when rate-of-return regulation is used to set rates in for the "core" services). Conversely, the fact that incumbent LECs are subject to price cap regulation does not obviate the need for *Computer Inquiries* non-discrimination and unbundling rules, as SBC suggests. *See id.* at 21-22. The *Computer Inquiries* rules were designed to prevent the Bells both from "subsidizing" *and* "discriminating in favor of their enhanced services." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand & Notice of Proposed Rulemaking, FCC 02-39, ¶ 45 (Feb. 21, 2002). *see also Bell Atlantic Cos. Offer of Comparably Efficient Interconnection to Intranet Management Service Providers*, Order, 13 FCC Rcd. 15617, ¶ 2 (1998) ("In *Computer III*, the Commission required BOCs to file CEI plans as a nonstructural safeguard against BOC cross-subsidization *and* discrimination in the provision of enhanced services.") (emphasis added).

[165] SBC at 22.

[166] *See Implementation of Section 3 of the Cable Television Consumer Protection & Competition Act of 1992*, Statistical Report, 16 FCC Rcd. 4346, ¶¶ 5, 34 (2001).

[167] *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd. 6005, ¶ 24 (2001) (noting that programming expenses rose 12.2 percent in 1999, and were projected to rise an additional 10.9 percent in 2000); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd. 978, ¶ 26 (2000) (reporting that programming costs increased 13.9 percent in 1998). *See also Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd. 1244, ¶ 22 (2002) (programming costs for 2001 expected to exceed $9 billion).

NCTA, between 1996 and 2000, the cable industry spent over $36 billion on basic and premium programming – roughly 75 percent more than the $20.6 billion it spent during the previous five years.[168] Prices for the most desirable programming in particular have skyrocketed. Disney, for example, recently increased the price for ESPN by 20 percent for the fourth straight year.[169]

As noted, there are also fundamental technical differences between cable and telephone systems relevant to application of access obligations. Because cable systems were not designed to have multiple service providers, achieving multiple ISP access is by no means straightforward, and it is far from clear which technical, operational and business model approaches will ultimately prove sustainable.

In contrast, incumbent LEC networks were designed from the outset for common carriage. As AT&T explained (at 51-53), this is true not just for basic "analog" services, but also for broadband Internet access. The *Computer Inquiries* obligations were a response to services that allowed remote computer terminals to access centrally located computers over *digital* services (such as T1-based services) that do not differ in any relevant technological respect from the digital DSL-based services that the Bells and other incumbent LECs offer over their copper loops today. Indeed, there are, in fact, no material technical differences between current (and future) generation wireline broadband technologies and older technologies, such as T1.5 transport, that carriers have used for decades to provide high-speed transmission services over copper loops.[170]

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[168] See Robert Sachs (NCTA), Prepared Testimony before Senate Committee re: Cable and Video: Competitive Choices (April 4, 2001).

[169] *See* Steve Donohue & R. Thomas Umstead, *ESPN 20% Fee Hike: Maximum Headache*, Multichannel News, May 7, 2001.

[170] SBC does not deny that it is technically feasible to provide bare transport at wholesale on its current network, but argues that this may not be possible in the future with the advent of new

VI. THE ILECS' PROPOSALS FOR BLANKET PREEMPTION OF PRO-COMPETITIVE REGULATION BY STATE COMMISSIONS WITH JURISDICTION OVER TELECOMMUNICATIONS SERVICES WOULD BE BOTH UNLAWFUL AND BAD POLICY.

In response to the *Notice*'s request (¶ 62) for comment regarding the proper role of state commissions if wireline broadband Internet access services are classified "as an information service under Title I of the Act," the Bells contend that there should be absolutely no role for state commissions. BellSouth insists (at 24) that "the Commission should preempt the states"; SBC maintains (at 33) that "the Commission must preempt state regulation of broadband services"; and Verizon requests (at 36-37) not only that the Commission "preempt states from regulating broadband services directly," but that it "should also make clear that they cannot do so indirectly."

There appears to be little dispute regarding the controlling legal standards. The Bells agree that congressional intent "'is the ultimate touchstone.'"[171] Similarly, there is no dispute that, as a general matter, "Congress may choose to '. . . share the task with states.'"[172] But the Bells ignore these principles when they purport to analyze the terms of the 1996 Act to meet their preconceived conclusions.

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packet switching technologies. SBC at 26. Tellingly, SBC does not provide any expert support or citation for this proposition. Should SBC's lawyers' predictions about the ability to "unbundle" future networks be proven true, SBC would, of course, at that time be able to raise a "technical infeasibility" defense to application of the *Computer Inquiries* unbundling rules. Clearly, however, it makes no sense to gut core *Computer Inquiries* obligations today on the basis of speculation about future technologies.

[171] *E.g.*, SBC at 35 n.50 (quoting *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 208 (1985)); *see also English* v. *General Electric Co.*, 496 U.S. 72, 78-79 ("Pre-emption is fundamentally a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one").

[172] SBC at 35 n.51 (quoting *Rice* v. *Santa Fe Elevator Corp*, 331 U.S. 218, 230 (1947)).

For example, SBC (at 35) paraphrases the language of section 706 of the 1996 Act and argues that it reflects the "clear" "intention" of Congress to preempt *any* state role with regard to wireline broadband service. But the actual language of section 706 confirms that Congress intended exactly the opposite. Section 706 (emphasis added) provides:

> The Commission *and each State commission with regulatory jurisdiction over telecommunications services* shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[173]

By its terms, section 706 reflects Congress' clear intent that *both* the Commission *and* "each State commission with regulatory jurisdiction over telecommunications services" would have concurrent roles "regulating" wireline broadband services.[174] Indeed, section 706 employs precise language to avoid ambiguity on this point: "*each* State Commission . . . shall encourage deployment" using "regulating methods."[175]

In the face of this language, it is untenable to maintain that the Commission should deny state commissions *any* role in encouraging deployment of wireline broadband services.[176] To be

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[173] Pub. L. 104-104, Title VII, § 706, 110 Stat. 153 (1996) (reprinted in 47 U.S.C. § 157, historical and statutory notes). "[A]dvanced telecommunications capability" squarely encompasses wireline broadband Internet access services. 47 U.S.C. § 157, statutory note (c)(1) (defining "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics and video telecommunications"). The *Notice* acknowledges that Section 706 applies squarely to wireline broadband services. *Notice* ¶ 1 n.2.

[174] Pub. L. 104-104, Title VII, § 706, 110 Stat. 153 (1996) (reprinted in 47 U.S.C. § 157, historical and statutory notes).

[175] *Id.*

[176] *See* California at 2 ("in section 706 Congress made clear that it expected the FCC and the states to use their regulatory tools over common carrier services to further the deployment of . . . DSL service, to all Americans").

sure, section 706 does not constitute an independent grant of authority to the Commission or to each of the state commissions, but it unquestionably reflects Congress' intent that there be a role for "State Commissions with regulatory jurisdiction over telecommunications service" to "further Congress' objective of opening all telecommunications markets to competition, including the market for advanced services."[177] Accordingly, the Bells' request that the Commission deny relevant state commissions *any* role in encouraging deployment of wireline broadband must be rejected because Congress "explicitly disclaimed any intent categorically to pre-empt state law" in the manner proposed by the Bells.[178]

Equally misguided is SBC's reliance upon section 261(c) as a basis for wholesale preemption. Section 261(c) provides that "nothing in this part [*i.e.*, sections 251 to 261] precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition . . . as long as the State's requirements are not inconsistent with this part or the Commissions regulations to implement this part."[179] SBC contends (at 35) that once the Commission concludes that *retail* wireline broadband Internet services are information services, state commissions can no longer apply section 251(c) to unbundling or resale requirements with respect to broadband transmission. But that is a *non sequitur* – unbundling and resale obligations apply to underlying facilities and wholesale services.

The Bells' proposal to deny the state commissions any role regarding wireline broadband services is also bad policy. State commissions "remain[] vitally interested in resolving"

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[177] *Deployment of Wireline Servs. Offering Adv. Telecomms. Capability*, Mem. Op. & Order & NPRM, 13 FCC Rcd. 24012, ¶ 76 (1998).

[178] *California Federal Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 281 (1987).

[179] 47 U.S.C. § 261(c).

competitive disputes in this area.[180] As the Commission has recognized, state commissions are best able to assess the local variations that naturally occur in the availability or cost of wireline broadband services.[181] As California (at 6) explains, "the market for high-speed transport services used by residential customers to access the internet is local in nature." And the Commission has agreed that "the relevant geographic markets for residential high-speed Internet access services are local" and that "a consumer's choices are dictated by what is offered in his or her locality."[182] Thus, States are vitally interested and authorized parties to assist in the effort to increase deployment of and competition for broadband services, and they should not be cut out of the process by ill-advised (and ultimately unlawful) preemption.

[180] Ohio PUC at 40.

[181] *See, e.g.*, *Application of Ameritech Mich. Pursuant to Section 271 to Provide In-Region, InterLATA Services in Mich.*, Mem. Op. & Order, 12 FCC Rcd. 20543, ¶ 30 (1997) ("the state commissions' knowledge of local conditions and experience in resolving factual disputes affords them a unique ability to develop a comprehensive, factual record regarding the opening of the BOCs' local networks to competition"); State Consumer Advocates at 20 ("State commissions must be able to determine what is best for their particular state's broadband marketplace").

[182] *See Applications for Consent to the Transfer of Control of Licenses & Section 214 Authorizations by Time Warner, Inc. and American Online, Inc.*, Mem. Op. & Order, 16 FCC Rcd. 6547, ¶ 74 (2001). Nor should the Commission, as BellSouth suggests (at 26-29), abandon its Part 64 cost allocation rules. This proposal is outside the scope of this proceeding, *id.* at 28, and BellSouth is wrong to claim that the rules have "out-lived [their] usefulness," *id.* If wireline broadband Internet access service were deemed exempt from Title II regulation – and it should not be – then the Part 64 rules would be critical to determining if that service "receive a subsidy by having part of their costs passed on to regulated services." *Id*. at 27. That is especially because these services are "provided . . . using the traditional telephone platform." *Notice* ¶ 9.

CONCLUSION

For the foregoing reasons, the Commission should confirm that standalone broadband transmission services are common carrier telecommunications services; incumbent LECs may not cease providing those services; broadband Internet access services are information services; and the Bells must comply with the section 251 (c)(3) and *Computer Inquiries* unbundling and nondiscrimination obligations without regard to broadband and narrowband labels.

Respectfully submitted,

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July 1, 2002

LIST OF COMMENTERS CITED

Abbreviation In Reply Comments	Name Of Commenter
AISPA	American ISP Association
Allegiance	Allegiance Telecom, Inc.
AOL Time Warner	AOL Time Warner Inc.
AT&T	AT&T Corp.
BellSouth	BellSouth Corp.
Big Planet	Big Planet, Inc.
California	People of the State of California and the California PUC
Covad	Covad Communications Co.
DirecTV	DirecTV Broadband, Inc.
EarthLink	EarthLink, Inc.
Ohio PUC	Public Utilities Commission of Ohio
Ohio/Texas/Washington ISP Assocs.	Ohio ISP Association; Texas ISP Association; Washington Association of ISPs
Qwest	Qwest Communications Int'l, Inc.
SBC	SBC Communications Inc.
State Consumer Advocates	State Consumer Advocates
Statement of 43 Economists	Debra J. Aron, *et al*.
Verizon	Verizon
Verizon Lexecon Economists	Professor Kenneth Arrow, *et al.*
WorldCom, *et al.*	WorldCom, Inc.; Competitive Telecommunications Assoc.; Association for Local Telephone Services

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Comments of AT&T Corp. was served, by the noted methods, the 1st day of July, 2002, on the following:

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